Petition

81-1069

Office - Supreme Court, U.S.
FILED
DEC 7 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-.....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH TERRELL, JR., *et al.*,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOSEPH P. HUDSON
1909 30th Avenue
Gulfport, Mississippi 39501

DANIEL B. EDELMAN
Yablonski, Both & Edelman
Suite 800
1140 Connecticut Ave., N.W.
Washington, D.C. 20036

DEMETRIUS C. NEWTON
2121 8th Avenue North
Birmingham, Alabama 35203

BARRY L. GOLDSTEIN*
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005
(202) 638-3278

JACK GREENBERG
JAMES M. NABRIT, III
O. PETER SHERWOOD
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Petitioners

* Counsel of Record

QUESTIONS PRESENTED

1. Which of the 9 conflicting and overlapping standards announced by 7 different circuits should be applied to determine how and when a defendant must be "named" in a charge filed with the EEOC in order to be subject to suit under Title VII of the 1964 Civil Rights Act?

2. Did the court of appeals err in holding that petitioners failed adequately to name any international unions in their pro se charges filed with the EEOC where the charges in fact named the alleged union discriminators as follows:

   a. "International Molders & Allied Workers, Local 342";

b. "International Association of Machinists & Aerospace Workers, Lodge 359";

c. "Brotherhood of Boilermakers, Blacksmiths, Forgers, Helpers, Local 583"; and

d. "Patternmakers Association of Birmingham, affiliated with the Patternmakers League of North America A.F.L."

Parties Below

The following includes all of the parties to the proceeding below:

1. International Association of Machinists and Aerospace Workers and its Lodge 359.
2. Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers and its Local 583.
3. International Molders and Allied Workers Union and its Local 342.
4. Patternmakers League of North America and the Patternmakers Association of Birmingham.
5. United Steelworkers of America and its Local 2140.

7. United States Pipe and Foundry Company, a subsidiary of Jim Walter Resources, Inc.

8. Local 136, International Brotherhood of Electrical Workers.

9. Joseph Terrell, Walter Dudley, Thomas Green, Johnny Long, Albert Mason, Marcus Oakes, Sam Walker, and the class of black workers at U.S. Pipe plant whom they represent.

10. Equal Employment Opportunity Commission, Amicus Curiae.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	iii
Table of Authorities	vi
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	17
Conclusion	47
Attachment A, EEOC Charges Filed in 1969	
APPENDIX	
Order of Court of Appeals Denying Rehearing, August 7, 1981	1a
Opinion of Court of Appeals, May 14, 1981	3a
Judgment of District Court, January 14, 1980	54a

Page

Rule 54(b) Certification of District Court, January 14, 1980 ..... 56a

Opinion of District Court, October 16, 1979 ..... 58a

TABLE OF AUTHORITIES

Cases:

	Page
Batis v. Great American Federal Savings & Loan Ass'n, 452 F. Supp. 588 (W.D. Pa. 1978)	32
Bernstein v. National Liberty International Corp., 407 F. Supp. 709 (E.D. Pa. 1976)	18,33
Braxton v. Virginia Folding Box Co., 72 F.R.D. 124 (E.D. Va. 1976)	40
Butler v. Local No. 4, Laborers International Union, 308 F. Supp. 528 (N.D. Ill. 1969)	19,37
Byron v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975)	19,36
Canavan v. Beneficial Finance Corp., 553 F.2d 860 (3d Cir. 1977)	18,25,36
Chastang v. Flynn & Emrich Co., 365 F. Supp. 957 (Md. 1973)	19,33-34
Coley v. M & M Mars, Inc., 461 F. Supp. 1073 (M.D. Ga. 1978)	34

Page

Conley v. Gibson, 355 U.S. 41 (1957) 43

Curran v. Portland Superintending School Committee, 435 F. Supp. 1063 (Me. 1977) 18,31,33,37

Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979) 18,26

Delaware State College v. Ricks, 449 U.S. 250 (1980) 22

EEOC v. Brotherhood of Painters, 384 F. Supp. 1264 (S.D. 1974) 41

EEOC v. International Brotherhood of Electrical Workers, 476 F. Supp. 341 (Mass. 1979) 34,40

EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975) 30

Eggleston v. Plumbers' Local 130, 26 FEP Cases 1192 (7th Cir. 1981) 9,26,28,30

Eldredge v. Carpenters Joint Apprenticeship Committee, 440 F. Supp. 506 (N.D. Cal. 1977) 19,34

Escamilla v. Mosher Steel Co., 386 F. Supp. 101 (S.D. Tex. 1975) 18

Page

Evans v. Sheraton Park Hotels, 503 F.2d 177 (D.C. Cir. 1974) 29,30

Flesch v. Eastern Pennsylvania Psychiatric Institute, 434 F. Supp. 963 (E.D. Pa. 1977) 19,36

Friedman v. Weiner, 515 F. Supp. 563 (Colo. 1981) 18

Gibson v. Local 40, Supercargoes, etc., Union, 543 F.2d 1259 (9th Cir. 1976) 27,61

Glus v. G.C. Murphy, 629 F.2d 248 (3d 1989), vac. and rem. on other grounds, 101 S.Ct. 2013 (1981) 28

Glus v. G.C. Murphy 562 F.2d 880 (3d Cir. 1977) 28-30,40

Goodman v. Bd. of Trustees of Community College, 498 F. Supp. 1329 (N.D. Ill. 1980) 18,33

Guerra v. Manchester Terminal Corp., 498 F.2d 641 (5th Cir. 1974) ... 36

Hanshaw v. Delaware Technical and Community College, 405 F. Supp. 292 (Del. 1975) 19,31

Haines v. Kerner, 404 U.S. 519 (1972) 44

Page

Hardison v. TWA, 375 F. Supp. 877 (W.D. Mo. 1974), rev'd on other grounds, 527 F.2d 22 (8th Cir. 1975), rev'd, 432 U.S. 63 (1977) 34,40

Henry v. Texas Tech. University, 466 F. Supp. 141 (W.D. Tex. 1979) 18,37

Hochstadt v. Worchester Foundation, 425 F. Supp. 318 (Mas. 1976) ... 19,35

Hughes v. Rowe, 449 U.S. 5 (1980) 44

International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977) 7

I.U.E. v. Robbins & Myers Co., 429 U.S. 229 (1976) 22

Jackson v. University of Pittsburgh, 405 F. Supp. 607 (W.D. Pa. 1975) 19,35

Jacobs v. Board of Regents, 472 F. Supp. 663 (S.D. Fla. 1979) 18,32

Jamison v. Olga Coal Co., 335 F. Supp. 454 (S.D.W. Va. 1971) 35,39

Kaplan v. International Alliance of Theatrical Workers, 525 F.2d 1354 (9th Cir. 1975) 24,40

Page

Kelly v. Richland School Dist. No. 2, 463 F. Supp. 216 (S.C. 1978) 18,31,33

LeBeau v. Libby-Owens-Ford Co., 484 F.2d 798 (7th Cir. 1973) 41

Lewis v. Southeastern Pennsylvania Transp. Authority, 440 F. Supp. 887 (E.D. Pa. 1977) 18,31

Love v. Pullman Co., 404 U.S. 522 (1972) 22,42

McDonald v. America Federation of Musicians, 308 F. Supp. 664 (N.D. Ill. 1970) 19,33,37

Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) 31,39

Martin v. Easton Publishing Co., 478 F. Supp. 796 (E.D. Pa. 1979) 19

Mohasco Corp. v. Silver, 447 U.S. 807 (1980) 22,43

Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967) 34

Oscar Mayer & Co. v. Evans, 441 U.S. 750 (1979) 43

Page

Plummer v. Chicago Journeyman Plumbers, 452 F. Supp. 1127 (N.D. Ill. 1978), rev'd on other grounds sub. nom., Eggleston v. Plumbers' Local No. 130, 26 FEP Cases 1192 (7th Cir. 1981) 32

Puntolillo v. New Hampshire Racing Commission, 390 F. Supp. 231 (N.H. 1975) 34,36

Ricks v. Delaware State College, 605 F.2d 710 (3rd Cir. 1979), rev'd on other grounds, 449 U.S. 250 (1980) 27

Roberts v. Western Airlines, 424 F. Supp. 416 (N.D. Cal. 1976) 40

Romero v. Union Pacific R.R., 615 F.2d 1303 (10th Cir. 1980) 28-29

Scott v. Univ. of Delaware, 385 F. Supp. 937 (Del. 1974) 19,33

Shehadeh v. Chesapeake & Potomac Telephone Co., 595 F.2d 711 (D.C. Cir. 1978) 25

Schick v. Bronstein, 447 F. Supp. 333 (S.D.N.Y. 1978) 18,33

Skyers v. Port Authority of New York and New Jersey, 431 F. Supp. 79 (S.D.N.Y. 1976) 19,31

Stevenson v. International Paper Co., 432 F. Supp. 390 (W.D. La. 1977) 32,37,41

Stith v. Manor Baking Co., 418 F. Supp. 150 (W.D. Mo. 1976) 18,31,33,37

Stringer v. Commonwealth of Pennslyvania Department of Community Affairs, 446 F. Supp. 704 (M.D. Pa. 1978) 32

Taylor v. Armco Steel Corp., 373 F. Supp. 885 (S.D. Tex. 1973) .. 39

Thornton v. East Texas Motor Freight, Inc., 497 F.2d 416 (6th Cir. 1974) 46

Torockio v. Chamberlin Mfg. Co., 51 F.R.D. 517 (W.D. Pa. 1070) .. 40

United Air Lines v. Evans, 431 U.S. 553 (1977) 22

Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670 (Md. 1979) 18,31

Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973) .. 19

Vogel v. Torrence Bd. of Educ., 447 F. Supp. 258 (C.D. Cal. 1978) 18,35

Page

Wallace v. International Paper Co., 426 F. Supp. 352 (W.D. La. 1977) 35

Watson v. Gulf & Western Industries, 650 F.2d 990 (9th Cir. 1981) ... 19,24

Wells v. Hutchinson, 499 F. Supp. 174 (E.D. Tex. 1980) 18,33

Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974) ... 26

Williams v. Massachusetts General Hospital, 449 F. Supp. 55 (Mass. 1978) 32

Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981) ... 18

Statutes and Other Authorities

Title VII of the Civil Rights Act of 1964 (as amended 1972), 42 U.S.C. §§ 2000e et seq. .... passim

28 U.S.C. § 1254(1) 2

Page

Annual Report of the Director of Administrative Office of the United States Courts (Wash. 1981) 23

Equal Employment Opportunity Commission, 12th and 13th Annual Reports (1981) 45

EEOC Compliance Manual, § 2. 45

Statistical Abstract of the United States, 1980 38

No. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH TERRELL, JR., et al.,

Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, et al.

Petition For A Writ of Certiorari To The United States Court of Appeals For the Fifth Circuit

==========

The petitioners, Joseph Terrell, Jr., et al., respect fully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 14, 1981.

OPINIONS BELOW

The May 14, 1981 opinion of the court of appeals is reported at 644 F.2d 1112, and is set out in the Appendix hereto, pp. 3a-53a. The decision of the district court of October 16, 1979, which is not officially reported, is reprinted in 22 FEP Cases 1695, and is set out in the Appendix hereto, pp. 58a-110a.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1981. A timely petition for rehearing was denied on August 7, 1981. On October 19, 1981, Mr. Justice Powell granted an order extending the time in which to file a petition for writ of certiorari until December 7, 1981. Jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 706(b) of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(b), provides in pertinent part:

> Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days and shall make an investigation thereof. Charges shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires.

Section 706(f)(1) of that Act, 42 U.S.C. 2000e-5(f)(1), provides in pertinent part:

> If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved, and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

STATEMENT OF THE CASE

This action was commenced on October 4, 1972, against the United States Pipe and Foundry Company and several local and

international unions.[1/] The complaint alleged systematic discrimination in job assignment, training and promotion of black employees.

Following extensive discovery, all parties to the litigation agreed upon injunctive relief, including modification of the seniority system at the plant. The company agreed to pay $510,000 in back pay in settlement of any monetary claims against it by the class members. Plaintiffs agreed not to seek back pay against

---

1/ Twelve unions were named as defendants. Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers and its Local 583; International Association of Machinists and Aerospace Workers and its Lodge 359; International Molders and Allied Workers Union and its Local 342; Patternmakers League of North America and its affiliate, Patternmakers Association of Birmingham; United Steelworkers of America and its Local 2140; and International Brotherhood of Electrical Workers and its Local 136. Prior to trial Summary Judgment was granted in favor of the IBEW. No appeal was taken from this Judgment.

Local 136, IBEW. The issue reserved for trial was the monetary liability of the remaining union locals and internationals.

Black employees had for decades been assigned on the basis of race to poorly paid "dead end" jobs. Under the seniority system in operation at the plant prior to the pretrial settlement, an employee's seniority was based on his length of service in a particular department or seniority unit, rather than service at the plant. A black worker with decades of service in one of the poorly paid predominantly black positions necessarily forfeited his seniority upon transferring to a traditionally white job. The seniority system effectively locked blacks into positions to which they had been assigned on the basis of race.

The critical issue regarding union liability was whether the seniority system to which they were parties was created or maintained with the intention to discriminate. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The separate seniority units into which employees were segregated largely coincided with the six distinct bargaining units represented by the six unions at the plant. Five of these unions were virtually all-white; on the other hand the Steelworkers, which represented the poorly paid black workers, was predominantly black. Plaintiffs advanced three basic claims regarding the intention behind the establishment and maintenance of the seniority system.

Plaintiffs urged, first, that a realignment of the seniority system which had occurred in 1950 was racially moti-

vated. In that year 10 positions represented by the Steelworkers, but staffed by whites, were transferred to the bargaining units represented by the Boilermakers and Machinists. At the same time all the black workers represented by the Boilermakers and Machinists were transferred to the bargaining unit represented by the predominantly black Steelworkers. As a result of this realignment the Boilermakers and Machinists joined the Patternmakers and Electrical Workers in having all white memberships. The blacks formerly represented by the Boilermakers and Machinists were precluded from promotion into the positions represented by these unions, while whites in the positions switched to those unions were afforded an opportunity to promote into jobs from which the blacks who remained in the Steelworkers

were effectively excluded. The district court held that the 1950 realignment was racially motivated, and that this aspect of the seniority system was illegal. This finding was upheld on appeal.

Plaintiffs also attacked those aspects of the seniority system created prior to 1950. The record showed that, when the plant was first organized in 1939, four of the unions, whose bargaining units were to define the seniority units, sought only to represent all or overwhelmingly white positions; none of them attempted to represent the predominantly black positions. In 1949 the Molders union successfully sought NLRB approval to represent the molders and the apprentices, all of whom were white, but did not seek to represent the molder helpers, who were black. During the period when the seniority system

was created the Boilermakers, Machinists, Molders, and Patternmakers each maintained "overtly discriminatory policies .... [t]he Machinists barred blacks from union membership, the Boilermakers relegated blacks to inferior 'auxiliary' locals, the Molders segregated the few blacks in their Alabama locals, and the Patternmakers claimed that there were no 'qualified niggers' in that state." App. 28a-29a. Nonetheless, the district court held that the decisions of these unions to seek to represent only white workers -- decisions which led to the creation of the correspondingly all-white bargaining and seniority units -- were not racially motivated. The court of appeals reversed, holding that this aspect of the seniority system, like the 1950 realighment, was the result of intentional discrimination. App. 29a-31a.

Finally, the plaintiffs argued that the seniority system was maintained with an intent to discriminate. The record shows that the all-white unions, Boilermakers, Machinists, Molders and Patternmakers opposed the efforts by the company and the Steelworkers to modify the seniority system so as to permit blacks to transfer to traditionally white jobs. While acknowledging that "[r]acial considerations were involved in the 1968, 1971, 1975, and 1977 negotiations concerning the modification of seniority," the district court held that the unions had not intentionally discriminated in refusing to modify the system. App. 102a-04a. The Fifth Circuit reversed and found that "the collective bargaining process tracked and reinforced the purposefully segregated job classification scheme ... and the conclusion is

inescapable that the seniority system itself shared in that same unlawful purpose." App. 26a.

The aspect of the ligitation below with which this petition is concerned is the extent to which the international unions are liable for back pay awards for this proven illegality.[2/] The initial 1969 EEOC charges, prepared by plaintiffs without the assistance of counsel, referred in only general terms to the union responsibility for the discriminatory seniority system. In 1973, with the assistance of counsel, plaintiffs amended their EEOC charges to

---

2/ The international unions affected by this question are the Boilermakers, Machinists, Molders, and Patternmakers. The Fifth Circuit ruled that these internationals were liable for the discriminatorily unlawful seniority system. The Fifth Circuit found that the Steelworkers were not liable and the plaintiffs do not seek review of this determination.

name expressly both the intentionals as well as their local affiliates. The district court held that the 1969 charges did not adequately name the internationals, and that the internationals' Title VII liability therefore only commenced 180 days before the 1973 amendment to the charge, while the locals were held liable for damages beginning 180 days before the original 1969 charges. App. 68a-69a. The district court also held that the international unions were subject to suit under 42 U.S.C. § 1981, and concluded that the § 1981 liability of the internationals commenced in 1971, one year prior to the filing of this action. App. 67a. The court of appeals affirmed the district court's decision that the 1969 EEOC charges had not adequately named the international unions. App. 51a. Thus, whether

the 1969 charges were in fact sufficient to provide a basis for a Title VII action against the internationals controls whether those internationals can be held liable for back pay claims for the period from January, 1969 through October, 1971.

The charges in a variety of ways implicated the international unions. There is some minor variations in the charges filed against each of the four internationals and in the relationships between each international and its local. However, the record indicates that the charges reasonably read refer to the internationals and that the internationals were closely involved in the affairs of their locals and the establishment and maintenance of the unlawful seniority system. First, the charges all but expressly name the inter-

nationals[3/] and expressly state that "unions," not just a local, were involved in the discrimination.[4/] Second, the charges referred to the role of "unions" in the discriminatory division of the plant into bargaining units. This reference necessarily implicates the internationals because the division of the plant into bargaining units resulted from actions taken by the internationals since locals did not exist at the plant prior to the

---

3/ For example, in one charge the alleged discriminator is listed as "International Association of Machinists & Aerospace Workers, Lodge 359." The petitioners have attached to this petition a chart which sets forth the name of the alleged discriminator and the substance of the charge exactly as it appears on the 1969 charges. Attachment A.

4/ For example, one charge states that "[t]he Patternmakers Union, along with other Unions, and the Company, have the departments divided up so Negroes would lose their seniority if they bid on some better jobs." Attachment A.

certifications of the bargaining units by the National Labor Relations Board.

Third, the bargaining units and the seniority system which were alleged to be discriminatory in the 1969 charges were maintained in collective bargaining agreements to which the internationals were parties.[5/] Finally, the international representatives took major roles in the collective bargaining negotiations and the constitution for each international establishes close supervision and control of the locals by the internationals.

5/ For example, the 1971 Machinists Agreement provides that "[t]his Agreement ... is made ... between [the Company] and the International Association of Machinists and Aerospace Workers on behalf of itself and Lodge 359 (hereinafter called the Union) ...." Plaintiffs' Exhibit 6, p. 3; see Plaintiffs' Exhibits 5-8 (Machinists); Plaintiffs' Exhibits 9-12 (Boilermakers); Plaintiffs' Exhibits 19-20 (Patternmakers).

REASONS FOR GRANTING THE WRIT

This case is among the latest in over 70 reported decisions on a problem of substantial and growing importance to the enforcement of Title VII of the 1964 Civil Rights Act. Title VII authorizes aggrieved persons to file suit against "the respondent named in"[6/] an administrative charge of employment discrimination filed earlier with the EEOC. Among the 40,000 charges filed with the EEOC each year, the vast majority are prepared by workers who have limited education and who lack legal counsel. Unschooled in the intricacies of the law, these charging parties frequently do not distinguish among closely associated entities -- between corporations and

---

6/ Section 706(f)(1); 42 U.S.C. § 2000e-5-(f)(1).

their parent[7] or sister[8] companies, between inter-related agencies of the same city or state,[9] between public[10] or pri-

---

7/ Stith v. Manor Baking Co., 418 F. Supp. 150 (W.D. Mo. 1976); Bernstein v. National Liberty International Corp., 407 F. Supp. 709 (E.D. Pa. 1976); see also Escamilla v. Mosher Steel Co., 386 F. Supp. 101 (S.D. Tex. 1975).

8/ Canavan v. Beneficial Finance Corp., 553 F.2d 860 (3d Cir. 1977).

9/ Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979); Wells v. Hutchinson, 499 F. Supp. 174 (E.D. Tex. 1980); Henry v. Texas Tech. University, 466 F. Supp. 141 (N.D. Tex. 1979); Schick v. Bronstein, 447 F. Supp. 333 (S.D.N.Y. 1978); Curran v. Portland Superintending School Committee, 435 F. Supp. 1063 (Me. 1977).

10/ Friedman v. Weiner, 515 F. Supp. 563 (Colo. 1981); Women in City Government United v. City of New York, 515 F. Supp. 295 (S.D.N.Y. 1981); Goodman v. Bd. of Trustees of Community College, 498 F. Supp. 1329 (N.D. Ill. 1980); Jacobs v. Board of Regents, 473 F. Supp. 663 (S.D. Fla. 1979); Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. 670 (Md. 1979); Kelly v. Richland School Dist. No. 2, 463 F. Supp. 216 (S.C. 1978); Vogel v. Torrence Bd. of Educ.,447 F. Supp. 258 (C.D. Cal. 1978); Lewis v. Southeastern Pennsylvania Transp.

vate[11] entities and their chief executives or officials, between local unions and councils or committees of locals,[12] and es-

---

10/ continued

Authority, 440 F. Supp. 887 (E.D. Pa. 1977); Skyers v. Port Authority of New York and New Jersey, 431 F. Supp. 79 (S.D.N.Y. 1976); Jackson v. University of Pittsburgh, 405 F. Supp. 607 (W.D. Pa. 1975); Hanshaw v. Delaware Technical and Community College, 405 F. Supp. 292 (Del. 1975); Byron v. University of Florida, 403 F. Supp. 49 (N.D. Fla. 1975); Scott v. University of Delaware, 385 F. Supp. 937 (Del. 1974).

11/ Watson v. Gulf & Western Industries, 650 F.2d 990 (9th Cir. 1981); Martin v. Easton Publishing Co., 478 F. Supp. 796 (E.D. Pa. 1979); Flesch v. Eastern Pennsylvania Psychiatric Institute, 434 F. Supp. 963 (E.D. Pa. 1977); Hochstadt v. Worchester Foundation, 425 F. Supp. 318 (Mass. 1976); Van Hoomissen v. Xerox Corp., 368 F. Supp. 829 (N.D. Cal. 1973); Chastang v. Flynn & Emrich Co., 365 F. Supp. 957 (Md. 1973); McDonald v. American Federation of Musicians, 308 F. Supp. 664 (N.D. Ill. 1970).

12/ Eggleston v. Plumbers' Local 130, 26 FEP Cases 1192 (7th Cir. 1981); Eldredge v. Carpenters Joint Apprenticeship Committee, 440 F. Supp. 506 (N.D.Cal. 1977); Butler v. Local No., 4, Laborers International Union, 308 F. Supp. 528 (N.D. Ill. 1969).

pecially between local unions and the international unions with which they are connected.[13/]

In the ensuing Title VII litigation defense counsel understandably insist that each legal entity must have been listed separately in the EEOC charge with the same precision one might expect of a skilled attorney drafting a civil complaint. The instant case is just one of the rapidly increasing number of decisions concerning when and how such related entities and individuals must be named in the charge.

The law in the lower courts on this important issue is not merely in a state of conflict; it borders on chaos. There are no fewer than nine different court of appeals' standards for deciding this

---

13/ See nn. 58-71, infra.

question. Three Circuits have established conflicting standards for determining whether a charge adequately "names" a particular respondent. Another three appellate rules have established varying standards for subjecting an unnamed party to suit because of events occurring in the EEOC investigation and conciliation process. A final three appellate rules provide that under certain conditions a defendant neither named in an EEOC charge nor involved in the administrative charge may nonetheless be sued in a Title VII action. The district courts, understandably confused by this diversity of appellate opinion, have formulated at least 18 other standards of their own. Each year witnesses the creation of still different, overlapping and conflicting standards. Certiorari should be granted to bring to an end this outpouring of legal creativity.

This Court has repeatedly recognized the importance of eliminating confusion arising from conflicting judicial interpretation of administrative filing requirements under Title VII. Love v. Pullman Co., 404 U.S. 522 (1972) (requirement of filing with a state agency); I.U.E. v. Robbins & Myers Co., 429 U.S. 229 (1976) (tolling of time period); United Air Lines v. Evans, 431 U.S. 553 (1977) (timeliness of charge); Mohasco Corp. v. Silver, 447 U.S. 807 (1980) (interpretation of when a charge is "filed"); Delaware State College v. Ricks, 449 U.S 250 (1980) (commencement of the time period). Having resolved conflicting interpretations of the provisions requiring a timely filing and a proper deferral to state agencies, the Court should resolve the conflicts regarding when an employer or union is properly "named in" an administrative charge.

Moreover, the large and increasing number of fair employment cases ensures that the confusion arising from varying judicial approaches to the interpretation of the requirement that a defendant be named in an administrative charge will increase unless this Court establishes the proper standard. In the twelve month period which ended June 30, 1981, 6,245 Title VII cases were filed. Annual Report of the Director of Administrative Office of the United States Courts (Wash. 1981), p. 75. These filings reflect a 350% increase over filings in 1973 and a more than 20% increase over filings in 1980. Id.

The courts of appeals have announced three different standards for deciding whether a charge adequately "names" a particular respondent. The Ninth Circuit will "read sympathetically" the language of

the charge;[14] thus a complaint was held to name an international union where it identified the party alleged to have discriminated as:

> I.A.T.S.E. Local 659 -- International Photographers of the Motion Picture Industries [15]

In the instant case the Fifth Circuit ruled that charge must "allege specific conduct which clearly implicate[s]" the disputed party.[16] Thus the Fifth Circuit concluded that the charges had not named the international unions although they were actually listed in language hardly distinguishable from that approved in the Ninth Circuit:

14/ Watson v. Gulf & Western Industries, 650 F.2d at 993.

15/ Kaplan v. International Alliance of Theatrical Workers, 525 F.2d 1354, 1359 (9th Cir. 1975).

16/ App. 51a.

Brotherhood of Boilermakers, Blacksmiths, Forgers, Helpers, Local 583

International Association of Machinists and Aerospace Workers, Lodge 359

International Molders & Allied Workers, Local 342. 17/

The District of Columbia 18/ and Third 19/ Circuits apply yet a third rule requiring that the language of a charge, including the specific allegations of discrimination, be sufficient to provide the EEOC with a "reasonable" opportunity to investigate the conduct of the putative defendant and attempt conciliation. 20/ Thus in the Third

---

17/ Plaintiffs' Exhibit 66; see Attachment A to this Petition.

18/ Shehadeh v. Chesapeake & Potomac Telephone Co., 595 F.2d 711, 728 (D.C. Cir. 1978).

19/ Canavan v. Beneficial Finance Corp., supra.

20/ Id. 863-64.

Circuit expressly listing a defendant in the portion of the EEOC charge form for "Others Who Discriminated Against You" is not by itself necessarily sufficient.

Furthermore, there are three different appellate rules regarding whether, even where a defendant is not named in the EEOC charge, events occurring in the EEOC investigation and conciliation process which follows the filing of the charge may render it subject to suit. In the Seventh Circuit[21/] it is sufficient that such a defendant have received both notice of the pending charge of discrimination and been given an opportunity to participate in the conciliation process, regardless of

---

21/ Eggleston v. Plumbers' Local 130, 26 FEP Cases at 1203; Davis v. Weidner, supra; see also Williams v. General Foods Corp., 492 F.2d 399, 404-05 (7th Cir. 1974).

whether a literal reading of the charge itself would have provided such a notice. In the Ninth Circuit an unnamed defendant may later be sued if it was actually served with the charge and treated as a party to the EEOC proceeding[22/] In the Third Circuit an unnamed defendant is subject to suit if its interests were adequately represented during the EEOC proceeding by a party that was named.[23]

Finally, there are three different rules regarding whether a defendant neither named in an EEOC charge nor involved de facto in the EEOC proceeding may nonetheless be sued in a subsequent

---

22/ Gibson v. Local 40, Supercargoes, etc., Union, 543 F.2d 1259, 1263, n. 1 (9th Cir. 1976).

23/ Ricks v. Delaware State College, 605 F.2d 710 (3rd Cir. 1979), rev'd on other grounds, 449 U.S. 250 (1980).

Title VII action. The Third,[24] Seventh[25] and Tenth[26] Circuits allow such suits if the four-part test announced in Glus v. G. C. Murphy, 562 F.2d 880, 888 (3rd Cir. 1977), is met. Under Glus a court considers each of the following factors, no one of which appears to be either necessary or sufficient:

(1) whether the role of the unnamed party could through the reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint;

(2) whether, under the circumstances, the interests of a named party are so similar as those of the unnamed party's that for the

---

24/ Glus v. G. C. Murphy, 562 F.2d 880 (3d Cir. 1977); see Glus v. G. C. Murphy 629 F.2d 248 (3d 1980), vac. and rem. on other grounds, 101 S. Ct. 2013 (1981).

25/ Eggleston v. Plumbers' Local 130, 26 FEP Cases at 1205.

26/ Romero v. Union Pacific R.R., 615 F.2d 1303, 1312 (10th Cir. 1980).

purpose of obtaining conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings;

(3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party;

(4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

In the Tenth Circuit, in addition to these criterion, "additional factors may be relevant."[27/] The Sixth[28/] and Seventh[29/] Circuits follow a decision in the District of Columbia Circuit in Evans v. Sheraton Park Hotel, 503 F.2d 177, 180-83

27/ Id.

28/ EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975).

29/ Eggleston v. Plumbers' Local 130, 26 FEP Cases at 1205 n. 32.

(D.C. Cir. 1974),[30] which permits joinder of a party unnamed in the EEOC charge if its presence in the Title VII lawsuit is necessary to provide complete relief. In the instant case petitioner repeatedly urged the Fifth Circuit to follow Glus,[31] but it declined to do so.

Faced with these conflicting and overlapping appellate standards, the district courts, rather than attempting to follow one line of decisions or another, have fashioned new criteria of their own, sometimes drawing on the reasoning of the appellate decisions, often breaking new

---

30/ See also Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973).

31/ Brief for Appellants, pp. 82, 84; Appellants' Petition for Rehearing, pp. 14, 16; Appellants' Suggestion for En Banc Consideration, pp. 13, 15.

ground. The circumstances under which the district courts will permit a defendant not literally named in the EEOC charge to be sued under Title VII include: (1) the unnamed defendant had actual notice of the EEOC charge,[32] (2) the unnamed defendant had notice and the named defendant was its agent[33] (3) the unnamed defendant had notice and was an agent of the named defendant[34] (4) the unnamed defendant had notice and had a legal relationship

---

32/ Vanguard Justice Society, Inc. v. Hughes, 471 F. Supp. at 688-89; Willliams v. Massachusetts General Hospital, 449 F. Supp. 55 (Mass. 1978); Hanshaw v. Delaware Technical and Community College, 405 F. Supp. at 296; Skyers v. Port Authority of New York and New Jersey, 431 F. Supp. at 81; Lewis v. Southeastern Pennsylvania Transportation Authority, supra.

33/ Kelly v. Richland School District No. 2, 463 F. Supp. at 219; Stith v. Manor Baking Co., supra.

34/ Curran v. Portland Superintending School Committee, 435 F. Supp. at 1074.

with the named defendant,[35] (5) the unnamed defendant had notice and its interests were adequately represented by the named defendant,[36] (6) the unnamed defendant had notice, the named defendant was its agent, and the unnamed defendant had an opportunity to participate in conciliation,[37] (7) the unnamed defendant had notice and an opportunity to comply voluntarily with the law,[38] (8) the

---

35/ Stevenson v. International Paper Co., 432 F. Supp. 390, 398 (W.D. La. 1977).

36/ Jacobs v. Board of Regents, supra; Stringer v. Commonwealth of Pennsylvania Department of Community Affairs, 446 F. Supp. 704, 706 (M.D. Pa. 1978).

37/ Plummer v. Chicago Journeyman Plumbers, 452 F. Supp. 1127, 1134 (N.D. Ill. 1978), rev'd on other grounds sub nom., Eggleston v. Plumbers' Local No. 130, 26 FEP Cases 1192 (7th Cir. 1981).

38/ Batis v. Great American Federal Savings & Loan Ass'n, 452 F. Supp. 588, 590 (W.D. Pa. 1978).

unnamed defendant had notice and there was a substantial identity between it and the named defendant,[39/] (9) the unnamed defendant had notice and actually participated in conciliation,[40/] (10) the unnamed defendant had notice and its joinder is necessary for complete relief,[41/] (11) there is a substantial identity between the named and unnamed defendants,[42/] (12)

39/ Kelly v. Richard School District No. 2, 463 F. Supp. at 219.

40/ Schick v. Bronstein, 447 F. Supp. at 336; Bernstein v. National Liberty International Corp., 407 F. Supp. at 715.

41/ Kelly v. Richland School District No. 2, 463 F. Supp. at 219.

42/ Stith v. Manor Baking Co., 418 F. Supp. at 156-57; Wells v. Hutchinson, 499 F. Supp. at 190; Goodman v. Board of Trustees of Community College, 498 F. Supp. at 1333; Curran v. Portland Superintending School Committee, 435 F. Supp. at 1074; Scott v. University of Delaware, 385 F. Supp. at 941; Chastang v. Flynn & Emrich Co., 365 F. Supp. at 964; McDonald v. American Federation of Musicians, 308 F. Supp. at 669.

the named and unnamed defendants are not "autonomous,"[43/] (13) the unnamed defendant was a necessary party for conciliation,[44/] (14) the unnamed defendant was a necessary party for voluntary compliance,[45/] (15) the charge was sufficient to notify EEOC of the involvement of the unnamed party,[46/] (16) the named defendant was acting as an agent of the unnamed defendant when it engaged in the discrimination,[47/]

43/ Hardison v. TWA, 375 F. Supp. 877, 880 (W.D. Mo. 1974), rev'd on other grounds, 527 F.2d 33 (8th Cir. 1975), rev'd, 432 U.S. 63 (1977); Moody v. Albemarle Paper Co., 271 F. Supp. 27 (E.D.N.C. 1967).

44/ Coley v. M & M Mars, Inc., 461 F. Supp. 1073, 1075 (M.D. Ga. 1978).

45/ Chastang v. Flynn & Emrich Co., 365 F. Supp. at 963.

46/ Eldredge v. Carpenters Joint Apprenticeship Committee, 440 F. Supp. at 525.

47/ EEOC v. International Brotherhood of Electrical Workers, 476 F. Supp. 341, 346-47 (Mass. 1979); Puntolillo v. New Hampshire Racing Commission, 390 F. Supp. 231, 236, n. 4 (N.H. 1975).

and (17) the unnamed defendant was part of the discriminatory scheme and was represented at conciliation.[48/] Some courts require that the respondents be precisely named and reject the inclusion of unnamed parties under any of these seventeen circumstances.[49/] Which standard a particular district court will choose to apply in a given case simply cannot be predicted.

The conflict which has spawned this diversity of standards among the federal courts is widely recognized. The Third

---

48/ Hochstadt v. Worchester Foundation, 425 F. Supp. at 323.

49/ Vogel v. Torrence Board of Education, 447 F. Supp. at 266; Wallace v. International Paper Co., 426 F. Supp. 352, 357 (W.D. La. 1977); Jackson v. University of Pittsburgh, 405 F. Supp. at 617; Jamison v. Olga Coal Co., 335 F. Supp. 454 (S.D. W.Va. 1971).

Circuit observed that while the Sixth Circuit has followed the District of Columbia Circuit's joinder practice, other courts "have held to the contrary under similar circumstances."[50/] The Fifth Circuit noted this same conflict in reserving judgment on this issue several years ago.[51/] The district courts have taken notice of the "divergence of authority" as to whether a Title VII defendant must have been literally named in the EEOC charge[52/] and regarding whether any naming require-

---

50/ Canavan v. Beneficial Finance Corp., 553 F.2d at 865.

51/ Guerra v. Manchester Terminal Corp. 498 F.2d 641, 647 n. 6 (5th Cir. 1974); see also Flesch v. Eastern Pennsylvania Psychiatric Institute, 434 F. Supp. at 971; Puntolillo v. New Hampshire Racing Commission, 390 F. Supp. at 235-36.

52/ Byron v. University of Florida, 403 F. Supp. at 53.

ment is jurisdictional in nature.[53] District court opinions expressly disapproving contrary appellate or district court decisions announcing differing rules are common.[54]

The largest and most important category of cases in which this issue arises concerns whether, and if so how, an aggrieved employee must separately name the international union as well as the union local in order to be able to sue the international in a Title VII action; "[t]he cases are divided" over the issue.[55] This

---

53/ Henry v. Texas Tech University, 466 F. Supp. at 150.

54/ Curran v. Portland Superintending School Committee, 435 F. Supp. at 1074; Stith v. Manor Baking Co., 418 F. Supp. at 155-57; see also, Butler v. Local No. 4, Laborers International Union, 308 F. Supp. at 531; McDonald v. American Federation of Musicians, 308 F. Supp. at 669.

55/ Stevenson v. International Paper Co., 432 F. Supp. at 396.

is a frequently recurring problem for two reasons. First, in most class action litigation union locals are effectively judgment proof; the average local treasury has less than $50,000 and over 8,000 locals of the approximately 46,000 locals which file reports with the Department of Labor have no assets at all.[56/] The typical international, by comparison, has almost $10 million in assets, and over 11 million in annual income.[57/]

Second, while the availability of the international as a defendant is often of vital legal importance, this is not a distinction that would necessarily be made by the ordinary charging party. In court union attorneys may understandably

---

56/ Statistical Abstract of the United States, 1980, p. 430 Table 717.

57/ Id.

seek to minimize the relationship between an international and its locals; but on the shop floor, and in representation elections, both union members and union officials take a very different approach. Among the international unions which have sought to thus disassociate themselves from their locals, and have urged that they must be listed separately in a pro se Title VII charge, are the International Brotherhood of Teamsters,[58/] the United Steelworkers of America,[59/] the United Mine Workers,[60/] the International Longshoremen's and Warehousemen's Union,[61/] the International As-

---

58/ Macklin v. Spector Freight Systems, Inc., 478 F.2d at 993, n. 25.

59/ Taylor v. Armco Steel Corp., 373 F. Supp. 885 (S.D. Tex. 1973).

60/ Jamison v. Olga Coal Co., 335 F. Supp. at 460.

61/ Gibson v. Local 40, Supercargoes, etc., Union, 543 F.2d at 1263, n. 1.

sociation of Machinists,[62] the International Brotherhood of Electrical Workers,[63] the United Electrical, Radio and Machine Workers,[64] the Brotherhood of Railway and Airline Clerks,[65] the International Printing and Graphic Communications Union,[66] the International Wholesale and Department Store Union,[67] the International Alliance

---

62/ Hardison v. TWA, supra.

63/ EEOC v. International Brotherhood of Electrical Workers, supra.

64/ Torockio v. Chamberlin Mfg. Co. 51 F.R.D. 517 (W.D. Pa. 1970).

65/ Roberts v. Western Airlines, 425 F. Supp. 416 (N.D. Cal. 1976).

66/ Braxton v. Virginia Folding Box Co., 72 F.R.D. 124 (E.D. Va. 1976).

67/ Glus v. G. C. Murphy Co., 562 F.2d 880 (3rd Cir. 1977).

of Theatrical Workers,[68] the United Glass and Ceramic Workers,[69] the International Brotherhood of Painters,[70] and the International Brotherhood of Pulp, Sulphite and Paper Mill Workers.[71]

The standard established by the Fifth Circuit in this case conflicts, not only with the plethora of lower court decisions on the same subject, but with the general principles established by this Court for construction of Title VII. The Fifth Circuit standard is unique in its harsh-

---

68/ Kaplan v. International Alliance of Theatrical Workers, supra.

69/ LeBeau v. Libby-Owens-Ford Co., 484 F.2d 798 (7th Cir. 1973).

70/ EEOC v. Brotherhood of Painters, 384 F. Supp. 1264 (S.D. 1974).

71/ Stevenson v. International Paper Co., supra.

ness. The 1969 charges which the court of appeals held failed to adequately name any international union in fact listed among the parties which had engaged in discrimination:

> International Association of Machinists & Aerospace Workers, Lodge 359
>
> International Molder & Allied Workers, Local 342
>
> Brotherhood of Boilermakers, Blacksmiths, Forgers, Helpers, Local 583 72/

The purported deficiency of these charges apparently must consist in the use of a comma, rather than a semicolon, after the word "workers." "Such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process." Love v. Pullman Co., 404 U.S. at 527; see

---

72/ Plaintiffs' Exhibit 66; Attachment A.

also Oscar Mayer & Co v. Evans, 441 U.S. 750, 761 (1979); Mohasco Corp. v. Silver, 447 U.S. at 816 n. 19. Four of the charges alleged broadly that the discrimination had been by the "union," not limiting the accusation to the locals, and one charge expressly complained of a union contract[73/] which had in fact been negotiated and signed by an international.[74/] In holding that these charges "failed to allege specific conduct which clearly implicated the Internationals"[75/] the Fifth Circuit set a standard far more stringent than any court would apply under the Federal Rules of Civil Procedure to a civil complaint, Conley v. Gibson, 355 U.S.

73/ Id.

74/ See nn.3-5, supra, and accompanying text.

75/ Appendix App. 51a.

41, 45-46 (1957), and far beyond what can reasonably be asked of such pro se allegations. Haines v. Kerner, 404 U.S. 519, 520 (1972); Hughes v. Rowe, 449 U.S. 5, 9 (1980).

Regardless of what standard this Court believes should apply to these cases, certiorari should be granted to end the extraordinarily complex and widespread differences which exist among the lower courts. The present confusion in the law invites defendants to challenge, and prompts plaintiffs to support the adequacy of the allegations in virtually any charge. This necessarily prolongs and complicates the judicial resolution of any case, and reduces the likelihood that these cases can be settled short of trial.

The EEOC, which receives more than 40,000 charges a year, several thousand of

them regarding discrimination by unions,[76] is in need of guidance as to the parties it can or should investigate in the face of a typically broadly written charge. EEOC employees in offices throughout the country who are directed by the Commission to assist complainants in drafting their charges[77] must have a clear standard in order to assure that they do not mislead complainants, as apparently occurred in this case.[78] Further decisions by the lower

---

76/ Equal Employment Opportunity Commission, 12th and 13th Annual Reports, pp. 48, 59 (1981).

77/ EEOC Compliance Manual, § 2.

78/ The same ambiguities are apparent in all the 1969 charges, each of which was sworn to and drafted in the hand of a single EEOC Field Representative, Jerry Swift. Plaintiffs Exhibit 66. It was the EEOC Field Representative who failed precisely to distinguish between the respective locals and internationals and unambiguously to name both as discriminating respondents. As clear as it is that

courts will only deepen and exacerbate the many-sided conflict which already exists among the more than 70 reported decisions. Only action by this Court can establish a clear and uniformly applied standard.

78/ continued

plaintiffs should not be penalized for layman's lack of verbal precision, it is equally unfair to penalize them "for administrative laxity or ineptness on the part of the EEOC." Thornton v. East Texas Motor Freight, Inc., 497 F.2d 416, 424 (6th Cir. 1974).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted

JOSEPH P. HUDSON
1909 30th Avenue
Gulfport, Mississippi
39501

BARRY L. GOLDSTEIN*/
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005
202-638-3278

DANIEL B. EDELMAN
Yablonski, Both & Edelman
Suite 800
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

JACK GREENBERG
JAMES M. NABRIT, III
O. PETER SHERWOOD
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York
10019

DEMETRIUS C. NEWTON
2121 8th Avenue North
Birmingham, Alabama 35203

Attorneys for Petitioners

*/ Counsel of Reco

ATTACHMENT A

EEOC CHARGES FILED IN 1969

Complainant	*Alleged Union Discriminators*	*Allegations*
Jackson	"Brotherhood of Boilermakers, Blacksmiths, Forgers, Helpers, Local 583"	"The Boilermakers Union does not admit Negroes and is party to a contract and a distribution of bargaining units that perpetrates segregated departments and dead end jobs for Negroes."
Dudley	"International Association of Machinists & Aerospace Workers, Lodge 359"	"The Union fails to admit Negroes and is party to a discriminatory division of jobs."
Mason	"International Molders & Allied Workers, Local 342"	"The Local does not press grievances for Negroes and treats Negroes discriminatorily in other ways."
Long	"United Steelworkers of America, AFL-CIO"	"The Company and the Union along with other Unions are party to a discriminatory division of the Plant and its departments into different bargaining units."

SOURCE: Plaintiffs' Exhibit 66.

Complainant	*Alleged Union Discriminators*	*Allegations*
Walker	"Patternmakers Association of Birmingham, affiliated with the Patternmakers League of North America, AFL-CIO"	"There are no Negro members of Patternmakers Union at U.S. Pipe, Bessemer Pipe Plant." "The Patternmakers Union, along with other Unions, and the Company, have the departments divided up so Negroes would lose their seniority if they bid on some better jobs."
Adams	"International Brotherhood of Electrical Workers, Local No. 136"	"The Electrician's Union, along with several other Unions and the Company, have the Pipe Plant divided up into different bargaining units so that Negroes lose their seniority if they bid on some jobs even in their own department."

Appendix

ORDER OF COURT OF APPEALS DENYING REHEARING

August 7, 1981

No. 80-7107, 80-7256

JOSEPH TERRELL, Walter Dudley, Thomas Green, Johnny Long, Albert Mason, Marcus Oakes, Sam Walker, on behalf of themselves and the class they represent,
Plaintiffs-Apellants,

v.

UNITED STATES PIPE & FOUNDRY CO., et al., Defendants,

LOCAL 2140, UNITED STEELWORKERS UNION LOCAL 342, INTERNATIONAL MOLDERS, APPLIED WORKERS UNION, et al.,
Defendants-Appellees.

JOSEPH TERRELL, JR., et al.,
Plaintiffs-Appellants,

v.

UNITED STATES PIPE & FOUNDRY CO., et al.,
Defendants,

LOCAL 2140, UNITED STEELWORKERS UNION,
Defendant-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC (Opinion May 14, 1081, 5 Cir., 198_, ___ F.2d ___).
(August 7, 1981)

PER CURIAM:

( ) The Petition for Rehearing is DENIED and no member of this panel nor Judge of this Administrative Unit in regular active service having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joseph W. Hatchett
United States Circuit Judge

*District Judge of the Norther District of Alabama, sitting by designation.

UNITED STATES CIRCUIT JUDGE

DECISION OF COURT OF APPEALS,
May 14, 1981

JOSEPH TERRELL, Walter Dudley, Thomas Green, Johnny Long, Albert Mason, Marcus Oakes, Sam Walker, on behalf of themselves and the class they represent, Plaintiffs, Apellants,

v.

UNITED STATES PIPE & FOUNDRY CO., et al., Defendants,

LOCAL 2140, UNITED STEELWORKERS UNION LOCAL 342, INTERNATIONAL MOLDERS, APPLIED WORKERS UNION, et al., Defendants-Appellees.

JOSEPH TERRELL, JR., et al., Plaintiffs-Appellants,

v.

LOCAL 2140, UNITED STEELWORKERS UNION, Defendant-Appellee.

Nos.7107, 80-7256

UNITED STATES COURT OF APEALS
Fifth Circuit
Unit B

May 14, 1981.

Rehearing and Rehearing En Banc Denied Aug. 7, 1981.

Before FAY and HATCHETT, Circuit Judges, and Grooms*, District Judge.

HATCHETT, Circuit Judge:

This appeal stems from a class action employment discrimination suit brought in 1972 under Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-2(c), and section 1981 of the 1866 Civil Rights Act, 42 U.S.C. § 1981, by black employees at the Bessemer, Alabama plant of U.S. Pipe and Foundry Company against their employer and their union representatives.[1/] Due to pretrial settlements by the Company and the electrical workers union, along with the agreement of all parties to a form of in-

---

* District Judge of the Northern District of Alabama, sitting by designation.

1/ This is a consolidated interlocutory appeal under 28 U.S.C. § 1292(b) and Federal Rule of Civil Procedure 54(b).

junctive relief and the postponement of trial on the allocation of any back pay liability, this litigation now focuses upon the alleged illegality of the Bessemer seniority system and any resulting liability on the part of five unions. These unions include one industrial union, the United Steelworkers of America (Steelworkers), Local 2140, and four craft unions: the Brotherhood of Boilermakers, Blacksmiths, Forgers, and Helpers (Boilermakers), Local 583; the International Association of Machinists & Aerospace Workers (Machinists), Lodge 359; the International Molders & Allied Workers Union (Molders), Local 342; and the Pattern Makers League of North America (Patternmakers), Birmingham Association.

Appellants, the class of black employees, challenge the decision of the trial

court that all but one aspect of the Bessemer seniority system was bona fide within the meaning of § 703(h) of Title VII and thus immunized from attack as a seniority system whose discriminatory effects were unintended. See 42 U.S.C. § 2000e-2(h). In addition, appellants challenge the court's procedural ruling that their charges filed with the EEOC in 1969 failed to name as respondents the international unions at the plant so as to permit any Title VII liability on their part to commence 180 days prior to the filing of these charges. See 42 U.S.C. § 2000e-5(f)(1). One of the appellees, the Steelworkers, cross-appeals the refusal of the district court to excuse them from legal responsibility for the seniority system on the separate ground that this predominantly black industrial union actively opposed the

largely white, craft unions in the establishment of a seniority system which worked to the disproportionate disadvantage of the Steelworkers. See 42 U.S.C. § 2000e-2 (c)(3).

We agree with two of these three challenges. We hold that the seniority system at Bessemer was not bona fide under §703(h), that the Steelworkers bear no legal responsibility for this discriminatory seniority system, but that the Internationals were insufficiently identified by the 1969 EEOC charges to trigger their Title VII liability at that time.

FACTUAL BACKGROUND

U.S. Pipe Co. has a plant in Bessemer, Alabama which manufactures pipe for water and sewage projects. Production and maintenance workers at the plant have elected as their bargaining representatives various

craft unions associated with the American Federation of Labor, as well as the non-craft steelworkers union affiliated with the Congress of Industrial Organizations. The district court found that the craft unions represent workers in the higher-skilled, better-paying jobs from which employees have the opportunity to move up in the company. The Steelworkers union represents workers in the least desirable, "dead-end" jobs. The craft unions are virtually all white. The Steelworkers union is predominately black.

The district court also found that the racial division between the unions stems partly from the company's historical practice of making job assignments on the basis of race. Discriminatory job assignments reflected the general racism which permeated all aspects of plant operations prior to 1965, from the segregation of

employee facilities to the prevention of equal employment opportunities.

After passage of the 1964 Civil Rights Act, a major cause of continuing inequality was the seniority system in effect at the Bessemer plant until 1975. The overall seniority system was a composite of separate bargaining agreements negotiated by the company with each union. These agreements were similar, however, in providing that seniority would be measured on the basis of length of service in the applicable seniority unit, with seniority units generally defined by the bargaining units. With few exceptions, an employee who transferred to a new unit received no credit for service to the company in his prior unit. As recognized by the district court, this inhibition upon transfers disproportionately prejudiced those workers in the predominately black Steelworkers

union who had been assigned to the least desirable, "dead-end" jobs. The appellants describe the discouraging effect of this system upon black advancement at the plant by pointing to the fate of one black employee who did transfer into a craft unit, losing twenty-six years of plant seniority, only to then lose his job completely as part of a reduction in plant employees which left on the job two white workers with just a few years of seniority in the craft unit. See our recent decisions in U.S. v. Gerogia Power Co., 634 F.2d 929 (5th Cir. 1981), and Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980), for descriptions of the discriminatory operation of seniority systems with "lock-in" provisions such as those at the Bessemer plant.

In the early years of plant operations, various craft unions attempted with

little success to represent employees in negotiating a collective bargaining agreement. In 1939, six international unions competed strenuously to represent some or all of the employees at the plant. The Steelworkers associated with the CIO, sought to represent all production and maintenance employees at the plant. Four unions affiliated with the AFL sought to represent employees based primarily upon their craft: the Boilermakers, Machinists, Patternmakers, and Electrical Workers. One other AFL union, the Molders, claimed not only those employees skilled in that craft, but all other production and maintenance employees except those claimed by the other AFL unions.

Elections supervised by the NLRB resolved this confrontation between the newly formed CIO, with its strategy of heterogeneous, plant-wide industrial or-

ganization, and the older AFL, with its traditional approach of organizing separate, homogeneous craft unions. The Boilermakers, Machinists, Patternmakers and Electrical Workers prevailed over the Steelworkers among these largely white craft employees. The Steelworkers defeated the Molders among the remaining, predominately black group of employees. "That the elections had racial implications cannot be doubted," according to the district court.

Passage of the Taft-Hartley Act enabled the Molders to return to the Bessemer plant in 1949 to attempt "craft severance" from the industrial union represented by the Steelworkers. See 29 U.S.C. § 159(b)-(2). Following an NLRB election among the all white employees with molder skills, the Molders union was certified as a separate craft unit.

In 1950, the unions formalized exist-

ing practices, without the sanction of the NLRB, by switching representation of thirteen positions from one unit to another. Ten jobs given to the Boilermakers and Machinists by the Steelworkers were staffed by white workers. Three positions given to the Steelworkers by the two craft unions were staffed by black workers. Though it continued to represent some white employees, the Steelworkers represented an even higher percentage of black workers as a result of this "swap." The Boilermakers and Machinists joined the Patternmakers and the Electrical Workers in having all white memberships.

The bargaining units at Bessemer retained this racially divided structure until the time appellants filed discrimination charges with the EEOC in 1969. In the period directly covered by this lawsuit, U.S. Pipe negotiated collective bargaining

agreements with each of the unions in 1968, 1971, and 1974. Prior to this time the Steelworkers had repeatedly advocated plant-wide seniority. Armed in 1968 with the recently enacted Civil Rights Act, the Steelworkers proposed plant-wide seniority on the first day of negotiations. The company expressed a willingness to make the requested changes, but noted the need for the approval of the other unions. The craft unions strongly disapproved of any change, and the "lock-in" provisions remained intact.

In 1971, the company initiated the proposal of plant-wide seniority. The Steelworkers met privately with the other unions several times in an effort to gain their agreement to such a system. Again the craft unions prevented any change.

In 1974, the Steelworkers met with the craft unions in advance of their separate

negotiations with the company in order to advocate plant-wide seniority. The craft unions were intransigent. The Steelworkers then agreed to a united union proposal to the company for plant-wide seniority qualified by a "unit preference" scheme which gave unit members priority consideration for job vacancies. While the Steelworkers and the company continued to express their preference for a complete plant-wide seniority system, both agreed to the compromise proposal.

THE DISTRICT COURT DECISION

The district court upheld the validity of the seniority system except for the 1950 "swap" of positions between the Steelworkers and the Boilermakers and Machinists. The court correctly recognized that in order for a seniority system to be bona fide under § 703(h) of Title VII, it must not have been created or maintained

with the intention to discriminate. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 97 S. Ct. 1843, 52 L.Ed.2d 396 (1977). The district court properly looked to the four factors extracted by us from the Supreme Court's opinion in Teamsters and set forth in James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977), cert. denied, 434 U.S. 1034, 98 S. Ct. 767, 54 L.Ed.2d 781 (1978), to assist in determining whether a particular seniority system stems from nondiscriminatory motivations:

(1) whether the seniority system operates to discourage all employees equally from transferring between seniority units;

(2) whether the seniority units are in the same or separate bargaining units (if the latter, whether that structure is rational and in conformance with industry practice);

(3) whether the seniority system had its genesis in racial discrimination; and

(4) whether the system was negotiated and has been maintained free from any illegal purpose.

James, 559 F.2d at 352.

The district court found that one of the James factors weighed in favor of appellants: The seniority system had its genesis in racial discrimination. Specifically, the court found that racial considerations played a major role in the election which produced the original bargaining and seniority units, and in the 1950 "swap" of employee positions between several units.

The district court ruled, however, that none of the other three James factors suggested an intent to discriminate through the Bessemer seniority system. Regarding the equality with which the system operated

upon all employees, the court noted that the "lock-in" provisions were neutral on their face and as applied. The court acknowledged that "a much larger percentage of blacks than whites would have reason to desire transfer but for the loss of seniority under the rules," and that "the seniority system has been shown to have a discriminatory impact upon black employees." The court believed these facts to be irrelevant to the determination of any racially discriminatory intent.

The court also found general rationality in the Bessemer bargaining structure, and thus weighed this factor against a finding of discriminatory purpose. Though fraught with racial overtones, the original configuration of the units was deemed rational when viewed in light of the divisions in the labor movement at the time of the original elections. The court

placed significance upon the fact that "notwithstanding discrimination against blacks within their own structures, the Boilermakers and Molders were neverthelsss seeking to represent black employees...." The court viewed the fact that the Molders later sought "craft severance" only among the all white employees in skilled positions, to the exclusion of their all black helpers, as fully justified by the NLRB practice of permitting such special elections only among skilled employees. The court recognized that the 1950 "swap" of jobs between unions was neither rational nor in conformity with industry practice. Yet the court treated this final change in the Besseer bargaining structure as nothing more than an isoldated incident which in no way implicated the overall seniority system.

The district court ruled that the final James factor, whether the seniority system was negotiated and maintained free from illegal purpose, again weighed in favor of the unions, with the exception of the craft unions inolved in the 1590 "swap." The court inferred that the "lock-in" seniority provisions negotiated by all the unions, including the largely black Steelworkers union, reflected non-racial considerations. Craft union maintenance of this system was deemed an effort to prevent competition from other white unions rather than an effort to block encroachment by black workers. The court concluded that racial considerations played a role only in the 1968, 1971, and 1974 negotiations, and then only in the positive context of proposals to remove discriminatory practices.

On balance, the court held that the racially discriminatory genesis of the

system provided insufficient evidence of an intent to discriminate through the creation and maintenance of the seniority system. Finding the seniority system bona fide under section 703, the court released all unions from liability under Title VII, with the exception of the Boilermakers and Machinists, whose liabilty was limited to the 1950 "swap." The court released the Steelworkers from liability for their part in this exchange because it found that they acted not out of racial animus, but instead out of a desire to offer representation to black employees in the Boilermakers and Machinists unions who felt discriminated against by these unions.

While the district court thus released the Steelworkers from liability, it also ruled that if it had erred in holding the seniority system bona fide, then the Steelworkers must share in union responsibility

for that system. The court relied upon a belief that the company, rather than the Steelworkers, acted as the principal advocates of plant-wide seniority. It assumed that the Steelworkers fully supported the 1974 joint union proposal of a "unit preference" restriction upon a plant-wide seniority system.

Finally, the district court held that appellants' 1969 EEOC charges failed to name the International Unions as respondents so as to trigger their liability at that time in the subsequent Title VII suit. The court based this conclusion upon the failure of these charges to explicitly name the Internationals.

We must determine whether the seniority system was bona fide; whether the Steelworkers are liable for that system; and whether the 1969 EEOC charges suffi-

ciently identified the Internationals as respondents.

THE ILLGALITY OF THE SENIORITY SYSTEM

Section 703(h) of Title VII excepts certain seniority systems from the reach of the Civil Rights Act of 1964:

> Notwithstanding any other provision of this Title, it shall not be an unlawful employment practice ... to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority ... system ... provided that such differences are not the result of an intention to discriminate because of race ....

42 U.S.C. § 2000e-2(h). We have held that the immunity created by section 703(h) extends not only to Title VII actions, but also bars section 1981 claims. Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157 (5th Cir. 1978), cert. denied, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979). Yet the immunity provided by section 703(h) extends to seniority systems with a dispar-

ate racial impact only when "differences in treatment [are] not the result of an intention to discriminate because of race." Teamsters, 431 U.S. at 353, 97 S.Ct. at 1863; accord, Southbridge Plastics Division v. Local 759, 565 F.2d 913 (5th Cir. 1978).

To assess the purposes underlying the Bessemer seniority system, we turn to the four factors identified in James v. Stockham Valves. The district court correctly found that the Bessemer seniority system had its genesis in purposeful racial discrimination. The record amply supports this conclusion by showing that the system arose in an era of overt racial discrimination at U.S. Pipe, when blacks were assigned to "dead-end" jobs, bargaining seniority units were defined by racial considerations, and seniority provisions allowed transfer to better units only through commission of "seniority suicide." See our

refusal to extend section 703(h) immunity to similar seniority systems in Swint v. Pullman-Standard, 624 F.2d 525 (5th Cir. 1980), and United States v. Georgia Power Co., 634 F.2d 929 (5th Cir. 1981). We need not decide whether the court's specific finding of the racial genesis of the Bessemer system is tantamount to a finding of "purposeful discrimination in connection with the establishment ... of the system," James, 559 F.2d at 351, because here, as in Swint and Georgia Power, we find evidence of discriminatory intent under each of the James factors and the totality of all circumstances.

The district court clearly erred in concluding that the Bessemer seniority system was negotiated and maintained free of discriminatory purposes. The record before us amply shows that we again face a situation in which

> the seniority system negotiated through the collective bargaining process tracked and reinforced the purposeful segregated job classification scheme maintained by the company and the conclusion is inescapable that the seniority system itself shared in that same unlawful purpose. The seniority system under the collective bargaining agreement was but part and parcel of the total package of purposeful discrimination at [the company].

Georgia Power, 634 F.2d at 936.

Even if the district court correctly held that the racially-charged union elections conformed to industry practice, the 1950 racial "swap" of positions, in defiance of all reason, reinforces the conclusion that the Bessemer seniority system was created and maintained unlawfully. We reject the district court's attempt to isolate this aspect of the seniority system so as to restrict union liability to that incident. We instead view this racial adjustment as an integral piece of evidence which manifested underlying racial purposes. The significance of

this final alteration of the bargaining structure cannot be underestimated since it removed almost all of the black workers assigned by the NLRB to craft unions.

The district court also erred in its considration of the James factor which focuses upon the equality with which a seniority system operates. The disparate impact of the Bessemer seniority system on black employees is obvious and well documented by the record. The district court recognized this disparate impact but concluded that it was irrelevant. We have since held that disparate impact constitutes not only relevant evidence of discriminatory purpose, Swint, but can conclusively resolve the "equality" factor in favor of those who have suffered such discrimination. See Georgia Power. As for the district court's reliance upon the facial equality with which the Bessemer

seniority system operated, we merely note that here again "facial equality ... was but a mask for the gross inequality beneath." Gerogia Power, 634 F.2d at 935.

Other factors aside from those isolated by James may be considered in determining the purposes underlying a seniority system. See Pettway v. American Cast Iron Pipe Co., 576 F.2d at 1192. One such factor in this case, a factor apparently ignored by the district court, is the overtly discriminatory policies of each of the craft unions at the time the seniority system was created and "corrected" to follow racial lines. At that time, for instance, the Machinists barred blacks from union membership, the Boilermakers relegated blacks to inferior "auxiliary" locals, the Molders segregated the few blacks in their Alabama locals, and the Patternmakers claimed that there were no

"qualified niggers " in that state. The Supreme Court had held that a court may take judicial notice of the exclusion of black workers from craft unions on racial grounds, United Steelworkers of America v. Weber, 443 U.S. 193, n.1, 99 S.Ct. 2721, n.1, 61 L.Ed.2d 480 (1979), but the record before us provides ample evidence of overtly disriminaoty policies of the craft unions involved in this case. Little purpose would be served by detailing these discriminatory policies. Such policies, however, offer strong additional evidence of racial motivation underlying the seniority system defended by the craft unions in the face of mounting opposition by the company and the Steelworkers.

In summary, the totality of circumstances surrounding the creation and maintenance of the seniority system at the Bessemer plant again "leaves us with the

definite and firm conviction that a mistake has been made. There can be no doubt, based upon the record in this case, about the existence of a discriminatory purpose." Swint, 624 F.2d at 533 (citations omitted). Our recent decisions in Swint and Georgia Power, overruling conclusions of nondiscriminatory intent, virtually compel condemnation of the Bessemer system because of the striking similarity between the "lock-in" seniority provisions and the comparable clarity of other evidence of discriminatory purpose. As in those cases, we find error in the failure of the district court (1) to consider the disparate impact of such systems, (2) to appreciate the integral importance of particular racial deviations from industry practice, (3) to focus upon additional factors, such as the avowedly racist policies of the craft unions, and (4) to recognize the

cumulative effect of separate pieces of evidence of racial motives, evidence which here compelled the specific finding that the seniority system had its "genesis in racial discrimination." We therefore hold that the Bessemer system cannot qualify for the immunity extended by section 703(h) of Title VII only to those seniority systems created and maintained without intention to discriminate. 42 U.S.C § 2000e-2(h).

THE STEELWORKERS UNION

The district court refused to excuse the Steelworkers from liability for any violation of Title VII by the Bessemer seniority system. The court viewed the Steelworkers' efforts to institute plant-wide seniority as subsidiary to such efforts by the company. The court focused upon the Steelworkers' adoption of the 1974 joint union proposal for "unit preference" as evidence of its failure to support a

true plant-wide seniority system. The Steelworkers cross-appeal this decision on the ground that they took every reasonable step to bring about plant-wide seniority. They argue that they settled upon the "unit preference" proposal only because it appeared to represent the best option available in light of craft union resistance to complete plant-wide seniority. Appellants support the court's decision by arguing that while the Steelworkers were not "passive" in opposing the discriminatory seniority system, their efforts to abolish it were "ineffectual." Appellants would have us direct the district court to take into consideration the Steelworkers' relatively commendable conduct when apportioning back pay liability among the unions. We refuse, however, to permit the Steelworkers union to suffer even the label of Title VII lia-

bility because the record before us clearly demonstrates that they met the legal requirement of taking every reasonable step to oppose a seniority system which operated primarily to discriminate against its own members.

We begin with established principles of law. Section 703(c)(3) of Title VII makes it unlawful for a union to "cause or attempt to cause an employer to discriminate...." 42 U.S.C § 2000e-2(c)(3). We have recognized that under the Act "[l]abor organizations, as well as employers, have an affirmative duty to take corrective steps to prevent the perpetuation of past discrimination." Myers v. Gilman Paper Co., 544 F.2d 837, 850 (5th. Cir.), modified in other respects on rehearing, 556 F.2d 758, cert. dismissed, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977) (citation omitted).

The Supreme Court has cautioned against legally excusing a party involved in an employment practice which had been found to violate Title VII: "given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of irradicating [sic] discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Albermarle Paper Co. v. Moody, 422 U.S. 405, 421, 95 S.Ct. 2362, 2373, 45 L.Ed.2d 280 (1975)(footnote omitted). One reason for caution in excusing a party involved in an unlawful employment practice stems from the congressional purpose of stimulating self-corrective action by employers and unions.

> It is the reasonably certain prospect of a backpay award that "provide[s]

> the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history."

Albemarle, at 417-18, 95 S.Ct. at 2371-72 (quoting United States v. N.L. Industries, Inc., 479 F.2d 354, 379 (8th Cir. 1973)).

Whether a party involved in an established Title VII violation may be excused from liability therefore turns upon whether that party has proved to the full satisfaction of the courts that it has taken every reasonable step to bring employment practices into compliance with the law. In applying this test, we have recognized that even a union which signs a contract establishing an unlawful seniority system may suffer no liability if it actively opposed the adoption of this system. See James v. Stockham Valves.

This same test has caused us, in the face of different circumstances, to hold a union liable for a seniority system which resulted from agreements negotiated by another union. In Carey v. Greyhound Bus Co., Inc., 500 F.2d 1372 (5th Cir. 1974), for example, we held the conduct of a union to be violative of Title VII though "disguised by a then veneer of racal neutrality." This apparent neutrality stemmed from the fact that the union could not negotiate directly with the bus company about the seniority of its members who would transfer to another unit represented by a different union. We discerned that the union hd not even made a "concerned attempt" to rectify discriminatory practices since it had not "actively sought" plant seniority. We conclude that the "ineffectual passivism" of the union facilitated the continuance of racial discrimina-

tion. We therefore held that this union shared in overall responsibility for the illegal seniority system. In Myers v. Gilman Paper Co., we likewise held a non-signatory union liable for seniority provisions in another union's bargaining agreement on the ground that "[i]t is settled that Title VII required [the non-signatory union] at some point to take 'the affirmative step to initiate negotiations in an effort to salvage for its own ex-members the seniority that they would inevitably and foreseeably lost [upon transfer].'" 544 F.2d at 852 (quoting Carey, 500 F.2d at 1379).

After carefully examining the record, we conclude that the Steelworkers diligently sought to bring about a nondiscriminatory, plant-wide system at Bessemer. We reach this conclusion based on the totality of circumstances in this case. In

particular, we note the facts stated below.

Appellants do not allege any discriminatory practices by the Steelworkers. The district court found that the evidence in this case supported the general observation that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." The United Steelworkers of America has a well-known history of striving to achieve racial equality and integration in the labor movement.

The Steelworkers local at Bessemer was consistently represented by black officials who had every reason to oppose a seniority system which disproportionately prejudiced its predominately black membership. These officals appear to have taken every reasonable step to bring about plant-wide seniority, from initiation of this proposal on the first day of the 1968 negotiations with

the company, to private lobbying efforts in 1971 and 1974 with the craft unions. Their acceptance of the "union preference" system in 1974 clearly represented a reasonable decision to gain some improvement, rather than suffering complete defeat at the hands of the craft unions.

In view of these and other circumstances evidenced by the record, we absolve the Steelworkers from any responsibility under Title VII for the discriminatory seniority system at the Bessemer plant. In so holding, we advance the congressional purpose of stimulating self-corrective union action against illegal employment practices. The penalty of back pay liability for those unions which passively acquiesce in discriminatory practices is matched with judicial recognition of those unions which have opposed such violations of the law through every means in their power.

THE LIABILITY OF THE INTERNATIONAL UNIONS

The precise procedural issue before us is whether the original charges filed by appellants with the EEOC identified the Internationals as respondents within the meaning of that portion of Title VII which authorizes legal action against parties "named" in the administrative charge. 42 U.S.C. § 2000e5(f)(1).[2/] The Internationals successfully argued in the trial court that they had not been named. Appellants claim

---

2/ 29 C.F.R. 1; 1601.12(h) provides:

> A charge may be amended to cure technical defects or omissions, including failure to verify the charge, or to clarify and amplify allegations therein. Such amendment ... will relate to the date the charge was first received.
>
> Originally adopted in 1965 and numbered § 1601.11(9), this regulation was amendd in 1979, without altering its substantive content to read as set forth above.

on appeal that the Internationals were sufficiently identified in the charges to fulfill the purposes of the Act. We disagree. The significance of this controversy and our conclusion becomes clear, however, only in the context of the procedural history of this case.

Appellants first filed charges with the Commission in 1969. The district court ruled that these charges fialed to identify the Internationals as respondents, though they indusputably named the Locals. In 1971, appellants brought this legal action under both Title VII and section 1981, naming the Internationals along with the Locals as defendants. Appellants then amended their original EEOC charges in 1973 to explicitly name the Internationals as respondents.

Commision regulations mandate that amended charges which merely clarify or am-

plify allegations in a prior charge shall "relate back" to the effective date of the earlier charge.[3/] See Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969). The district Court ruled, however, that it would be "improper" in this case to treat the amendments as relating back to the date of the original charges. The court viewed the amended charges as an attempted "addition" of the Internationals as respondents, rather than as a mere clarification of previously identified parties.[4/]

3/ 42 U.S.C. § 2000e-5(f)(1) provides that upon compliance with certain procedures fully met by appellants "a civil action may be brought against the respondent named in the charge" previously filed with the EEOC.

4/ The district court announced and explained its ruling as follows:

> It is clear from the reading of the amended EEOC charges dated August 2,

Only parties previously identified as respondents in charges filed with the EEOC are subject to subsequent liability under Title VII. 42 U.S.C. § 2000e-5(f)(1). All parties to this suit are in agreement that Title VII limits the liability of such respondents to matters occurring within 180 days of the filing of administrative

---

4/ continued

1973, which were prepared with the assistance of counsel experienced in discrimination matters, that the international unions were being added as respondents. The EEOC's earlier finding and right-to-sue letters had, consistently with the wording of the original charges, treated only the local unions and company as respondents prior to that date. While the amended EEOC charges, even though filed ten months after the institution of the lawsuit, are certainly to be recognized as effective against the internationals when filed, it would be improper to treat them as "relating back" for limitations' purposes to the earlier charges.

The district court therefore held that the potential liability of the Internationals commenced in 1971 under section 1981.

charges. There is also no dispute that the limitations period in this case for liability under section 1981 extends for one year, with the one year period measured from the commencement of judicial proceedings.

The district court applied these limitations periods to the Internationals in a manner consistent with its conclusion that they were unnamed in the original EEOC charges. The court ruled that the period of potential liability of the Internaionals under Title VII began only in 1973, i.e., 180 days prior to their "addition" as respondents in the amended charges. The court extended their possible liability back to 1971 under section 1981, i.e., one year before the filing of the suit in 1972. The court refused to treat the Internationals in the same manner as the Locals when ruling that any Title VII liability on

the part of the Locals commenced 180 days prior to the original 1969 charges.

Appellants challenge this restriction upon the potential liability of the Internationals. They argue that the district court erred in holding that the 1969 EEOC charges failed to identify the Internationals as respondents. The insist that the 1973 amended charges merely rendered explicit the clear implication of the Internationals as respondents in the original charges. Appellants therefore contend that the district court committed reversible error in refusing to relate the explicit naming of the Internationals in the amended charges back to the date of the original charges.

We begin with certain well-established principles. The remedial purposes of Title VII, and the paucity of legal training among those whom it is designed to protect,

require that a court construe an EEOC charge with the utmost liberality. E.g, Tillman v. City of Boaz, 548 F.2d 592 (5th Cir. 197)(liberality required in interpreting the parties named); Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970)(liberality required in interpreting the discrimination alleged). "For a lay-initiated proceeding it would be out of keeping with the Act to import common-law pleading necessities to this 'charge,' or in turn to hog-tie the subsequent lawsuit to any such concepts." Jenkins v. United Gas Corp., 400 F.2d 28, 30 n.3 (5th Cir. 1968). A court called upon to interpret such a charge must bear in mind that a fundamental purpose of the charge is to trigger an investigation of the EEOC. "All that is required is that [a charge] give sufficient information to enable EEOC to see what the grievance is about." Id. The

necessity for equally broad interpretation of such a charge at the administrative and judicial levels stems from the framework of Title VII and its goal of encouraging voluntary compliance through EEOC conciliation.

> The Commission, which must operate on the basis of the administrative charge, rarely drawn by an attorney, must therefore view the charge in its broadest reasonable sense in order to effectively attempt to eliminate, by the administrative process, the discriminatory practices and policies which it finds... Lacking enforcement powers, the Commission's disputes resolution machinery could not succeed if the federal courts were not in a position to review the complaint filed in a section 706 proceeding as broadly as the Commission views the charge.

Sanchez, 431 F.2d at 467 (quoting the amicus brief of the EEOC); see Tillman v. City of Boaz, 548 F.2d 592 (5th Cir. 1977)(deference should be given to EEOC interpretation of a charge). Such policy considerations have caused this court to adopt a rule of reason which permits the scope of a

Title VII suit to extend as far as, but no further than, the scope of the EEOC investigation which could reasonably grow out of the administrative charge.

> The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is not filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC.... Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. This it is obvious that the civil action is much more intimately related to the EEOC investigation than the words of the charge which originally triggered the investigation.

Sanchez, 431 F.2d at 466.

The reasonable limits of an investigation potentially triggered by an EEOC charge define not only the substantive limits of a subsequent Title VII action, but also the parties potentially liable in that action. See, e.g., Tillman v. City of Boax, 548 F.2d 592 (5th Cir. 1977); Kaplan

v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354 (9th Cir. 1975). In Kaplan, the Ninth Circuit focused upon a factual statement in an EEOC charge which explicitly named only a local union, but which necessarily implicated an international union in the alleged discrimination. The court reasoned that the fact that a contract specifically complained of had clearly been negotiated by the International sufficed to apprise the EEOC in "general terms" of the possible complicity of the International. The Kaplan court held thet such general notice to the EEOC was sufficient to permit the International to be named as defendant in a subsequent suit under Title VII. In so holding, the court relied primarily upon well-established rulings of this Court.

Our more recent decision in Tillman v. Boaz again looked to the factual alle-

gations of an EEOC charge, and the scope of ensuing EEOC efforts, in liberally interpreting the parties named in the charge. In Tillman, we held that the City of Boaz, Alabama, was liable under Title VII although it was not specifically named as as respondent, because a letter to the EEOC, specifically incorporated by reference in the EEOC charges, stated that "I would like to file a claim against the City of Boaz ...." and the charges themselves listed the City of Boaz as the employer who discriminated against the plaintiff. Pursuant to that letter and the accompanying charges, the EEOC investigated the City as well as its mayor, the named respondent. In that situation, we had no difficulty concluding that both the EEOC and the City had sufficient notice that the City was charged to justify imposing liability on the City.

Applying these precedents and principles favoring liberality to the facts now before us, we must nonetheless conclude that the Internationals were insufficiently implicated in the discrimination alleged in appellants' original charges to have reasonably triggered EEOC investigation of the Internationals. These charges failed to allege specific conduct which clearly implicated the Internationals. Quite reasonably, the EEOC then omitted the Internationals in its investigative and conciliatory efforts. The Internationals thus failed even to receive informal notice that they had been named through the Commission's administrative processes. Apparently recognizing that they had made a serious, substantive mistake -- not a mere technical error of pleading -- appellants amended their original EEOC charges to explicitly name the Interna-

tionals. Without holding appellants to the same level of draftsmanship as trained attorneys, we are constrained by the facts in this case to uphold the decision of the district court that no liability of the Internationals under Title VII shall commence until 180 days prior to these 1973 amended charges.

CONCLUSION

Because the record clearly demonstrates racially discriminatory purposes underlying the creation and maintenance of the Bessemer seniority system, we hold that it is non bona fide within the meaning of 42 U.S.C. § 2000e-2(h). Since the Steelworkers union took every reasonable step to eradicate this discriminatory system, we exclude them from any liability for that system under 42 U.S.C. § 2000e-2(c)(3). Finally, the fact that the allegations in ap-

pellants' 1969 EEOC charges did not clearly implicate the International unions causes us to hold that these charges did not trigger their liability at that time under 42 U.S.C. § 2000e-5(f)(1).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS.

JUDGMENT OF DISTRICT COURT
January 14, 1981

Filed Jan. 14, 1980

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION

No. 72-887

JOSEPH TERRELL, JR., et al.,

Plaintiffs,

vs.

UNITED STATES PIPE AND FOUNDRY COMPANY, et al.,

Defendants.

JUDGMENT

A Memorandum Opinion having been entered on October 16, 1979, which denied all the claims which the plaintiffs have asserted against Local 2140, United Steel-

workers of America, Local 342, International Molders and Allied Workers Union, Patternmakers Association of Birmingham, United Steelworkers of America, International Molders and Allied Workers Union, Patternmakers League of North America, International Association of Machinists and Aerospace Workers, and the Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers and the Court having entered a Certificate pursuant to Rule 54(b), Fed. R. Civ. P. that there was no just reason for delay and expressly directing the entry of final judgment, it is

ORDERED, ADJUDGED and DECREED that judgment be and it is hereby entered in favor of the above-listed defendants.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

RULE 54(b) CERTIFICATION
January 14, 1980

Filed Jan. 14, 1980

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION

No. CA 72-P-0887-S

JOSEPH TERRELL, JR., et al.,

Plaintiffs,

vs.

UNITED STATES PIPE AND FOUNDRY COMPANY, et al.,

Defendants.

RULE 54(b) CERTIFICATION

With respect to the dismissal of the plaintiffs' claims pursuant to the Memorandum of Opinion issued on October 16, 1979

against Local 2140, United Steelworkers of America, Local 342, International Molders and Allied Workers Union, Patternmakers Association of Birmingham, United Steelworkers of America, International Molders and Allied Workers Union Patternmakers League of North America, International Association of Machiniests and Aerospace Workers, and the Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers, it is CERTIFIED, in accordance with Rule 54(b), Fed. R. Civ. P.:

(1) That the Court has directed the entry of final judgment in favor of each of the defendants listed above; and

(2) That the Court has determined there is no just reason for delay.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

OPINION OF THE DISTRICT COURT

NORTHERN DISTRICT OF ALABAMA

October 16, 1979

CIVIL ACTION

No. CA 72-P-0887-S

==========

JOSEPH TERRELL, JR., et al.,

Plaintiffs,

vs.

UNITED STATES PIPE AND FOUNDRY COMPANY, et al.,

Defendants.

==========

Full Text of Opinion

POINTER, District Judge: -- For decision by the court in this employment discrimination case is the issue whether certain union defendants are liable to

the plaintiffs and the plaintiff class for back pay, costs, and attorneys fees. Liability is premised upon these defendants' roles in establishing and maintaining seniority systems at U.S Pipe's plant in Bessemer, Alabama, which allgedly discriminated against black employees contrary to 42 U.S.C.A. §§ 1981 and 2000e-2(c). The claim is not that the seniority systems in question were applied in a discriminatory non-uniform manner. Rather, the claim is that the seniority systems, by according seniority privileges on the basis of seniority units, had a discriminatory effect upon blacks by virtue of the company's having made racially discriminatory assignments to the different seniority units. Of critical importance are the defendants' contentions that the seniority systems were bona fide, neither instituted

nor maintained because of any intent to discriminate on the basis of race or color, and that they are therefore immunized from liability under 42 U.S.C.A. § 2000e-2(h).[1/]

I. History of the Litigation

A synopsis of the history of the litigation is helpful in understanding the context in which the court is confronted with this seemingly narrow issue.

The complaint, filed as a class action on October 4, 1972, by seven black workers, alleged a broad pattern of racially discriminatory practices at the Bessemer plant of United States Pipe and Foundry Company. Named as defendants were the company, six

---

1/ In Pettway v. American Cast Iron Pipe Co., 576 F.2d 1157, 17 FEP Cases 1712 (CA5 1978), the court ruled that immunity under 42 U.S.C.A. § 2000e-2(h) would bar not only Title VII claims, but also § 1981 claims. See footnote 37, 576 F.2d at 1191-92, 17 FEP Cases at 1736.

local unions,[2/] and the six international labor organizations with which they were affiliated. Summary judgment was ultimately granted in favor of one international union (IBEW) but denied as to two others (Boilermakers and IAM); and after a severed trial under F.R.CP. 42(b), it was determined that the Boilermakers and IAM internationals had potential liability in the case. See 7 EPD 9055, 6 FEP Cases 1027 (N.D. Ala. 1973).

The case against the remaining twelve defendants proceeded through normal, if prolonged, pretrail preparations. Three

---

2/ Local 2140, United Steelworkers of America ("Steelworkers"); Local 342, International Molders and Allied Workers Union ("Molders"); Patternmakers Association of Birmingham ("Patternmakers"); Lodge 359, International Association of Machinists and Aerospace Workers ("IAM"); Local 583, Brotherhood of Boilermakers, Blacksmiths, Forgers and Helpers ("Boilermakers"); and Local 136, International Brotherhood of Electrical Workers ("IBEW").

pretrial conferences were held, resulting in refinement of the contested issues. The case was allowed to be maintained as a class action, with the class (as last defined) being "all black persons who have been at any time after March 24, 1969 (or who may hereafter be) employed as production and maintenance employees at the Bessemer, Alabama, plant of U.S. Pipe and Foundry Company." Extensive discovery was undertaken -- involving some 20 sets of requests for admissions, 25 sets of interrogatories, 10 sets of requests for production of documents, and 15 depositions -- much of which being prompted by the intervening decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324, 14 FEP Cases 1514 (1977). Modifications to the seniority systems as a result of new collective bargaining agreements in January 1975 and November 1977 had

their own effect upon the litigation, as did the fact that the Molders and Pattern-makers unions had ceased to represent workers at the plant.

Shortly before the scheduled trial on liability issues -- the amount of backpay, if any, was to be determined at a later trial as necessary -- the court was advised that agreements to settle had been reached which, if approved, would resolve most of the issues in the case. All parties to the litigation had agreed to modifications in the seniority system. The company had agreed to pay $510,000 in back pay for distribution to the plaintiff class and $10,000 towards litigation expenses of plaintiffs' counsel, acknowledging also an obligation to pay plaintiffs' attorneys fees in an amount which, if not resolved by agreement, would be determined by the court. The plaintiffs agreed that they

would not seek a back pay award against the Steelworkers unions and would not be entitled to a back pay award against the IBEW.

In agreeing to the proposed settlements as a compromise of the issues to be resolved thereby, the plaintiffs did not admit that such relief would be all to which they would be entitled in the event of a trial, nor did the defendants admit that they had violated the employment discriminations laws. Even if the settlement were to be approved -- which would involve a hearing after notice to the class members -- there would remain certain unresolved issues for trial, principally the plaintiffs' claim that the Boilermakers, Patternmakers, Molders, and IAM unions were liable for back pay, costs, and attorneys fees. Moreover, the plaintiffs reserved the right to seek an award of

costs and attorneys fees against the Steelworkers and IBEW unions and, while admitting that their evidence would not support a back pay award against the Steelworkers unions, did not waive any entitlement to such an award if liability therefor were to be established by evidence presented at trial by the other unions.

Due to the readiness of the parties, the court determined to go forward with the trial of the liability issues that would remain were the settlements to be approved, with a hearing on the settlements to be scheduled at a later date. (It was, however, first determined by the court that the terms of the proposed settlements were within the range of reasonableness such that a hearing should be held to consider any objections to them.) It was recognized that, should the settlements ultimately be disapproved, the company would not be bound

by the findings made by the court in connection with the claims against the unions, but would be given later the opportunity to offer further evidence relevant to the claims made against it.

With the issues thus narrowed to the plaintiffs' claims of monetary liability on the part of the unions, trial was completed in three days -- a period which belies the quantity of evidence (frequently presented by summaries and data compilations) covering some forty years of industrial relations at U.S Pipe's Bessemer plant. After the trial it was decided that a hearing on the proposed settlemens should be deferred until entry of a ruling on the monetary claims against the unions, thereby enabling the class members to be better informed as to the consequenes of the proposed settlements.

As indicated, the evidence covers a span of several decades. This evidence has particular significance on the question of whether the company made racially discriminatory assignments of employees to the different seniority units and on the question as to the intent of the unions in agreeing to (if not advocating) seniority systems, based on seniority units. It is, however, appropriate at the outset to note that the claims of discrimination on which liability of the unions in this action may be premised are far more limited in duration under applicable periods of limitation. Claims under Title VII may be based on employment practices which preceded the filing of an EEOC charge naming such party by 180 days (plus ending holidays); those under 42 U.S.C. § 1981 may be based on practices which preceded the filing of the lawsuit by one year. Upon a consideration of the

filing of charges with the EEOC, which were introduced into evicence, and of the filing of the complaint in this case, of which the court takes judicial notice, it appears that the following are the earliest dates on which liability can be premised; December 23, 1968, as to Molders' Local 342, January 13, 1969, as to IAM Lodge 359; January 26, 1969, as to Boilermakers Local 583 and as to the Patternmakers Association of Birmingham; and October 4, 1971, as to the four international labor organizations. Without merit are the plaintiffs' attempts to establish longer periods of limitations against the international unions on the basis of amended Title VII charges[3/] or

---

3/ It is clear from the reading of the amended EEOC charges dated August 2, 1973, which were prepared with the assistance of counsel experienced in discrimination matters, that the international unions were being added as respondents. The EEOC's

on the basis of pretrial waiver.[4/]

One final procedural matter should be covered in this discussion of the history

---

3/ continued

earlier finding and right-to-sue letters had, consistently with the wording of the original charges, treated only the local unions and company as respondents prior to that date. While the amended EEOC charges, even though filed ten months after the institution of the lawsuit, are certainly to be recognized as effective against the internationals when filed. It would be improper to treat them as "relating back" for limitations' purposes to the earlier charges.

4/ Leaving aside the legal dispute whether identification of respondents in EEOC charges is truly jurisdictional or not, plaintiffs' claim of a waiver by the internationals fails to take account of the fact that EEOC charges were filed (albeit not until August 1973) against the internationals. The potential problem arising from failure to name the internationals in the original charges was noted in open court back in October 1973 as one which would involve further study. See 7 EPD ¶ 9055, 6 FEP Cases 1027. The international unions have not waived their rights to contest the periods covered by the EEOC charges.

of the litigation. After the plaintiffs and the company had agreed to a settlement in mid-1979 -- almost seven years after the lawsuit had been instituted -- several of the union defendants filed a cross-claim (mislabelled a counterclaim) against the company, seeking contribution or indemnification should the unions be held monetarily liable to the plaintiffs. This belated claim is due to be rejected. First, it is under the circumstances untimely and in the exercise of discretion should not at this late stage be permitted. Cf. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971). Second, if allowed, it would be without merit. Contribution among joint tortfeasors is not, at least in favor of one charged with an intentional tort, allowed -- and in the context of this particular case involving potential immunity from liability by virtue of an allegedly

bona fide seniority system the unions would not be held liable to the plaintiffs unless they were found to have acted with racially discriminatory intent in establishing or maintaining the seniority system. Moreover, as in factual matter based on the evidence in this case, it is clear that, to whatever extent the seniority systems negotiated in the 1968, 1971, 1975, and 1977 periods may have perpetuated the effects of prior discrimination, the deficiencies would be primarily chargeable against the unions, not the company.

II. THE SENIORITY SYSTEM AND ITS EFFECT UPON BLACKS.

Analysis of the seniority system during the period under direct attack by the plaintiffs involves a study of twenty collective bargaining agreements entered by the company -- with six unions in October

1968 and in November 1971, and with four unions in January 1975 and in November 1977.

The system in effect from November 1, 1968, through October 31, 1974, was essentially one based on seniority units.[5/] The proximately 135 job titles as to which the Steelworkers had jurisdiction were divided among twenty-four such seniority units; e.g., Cement Lining, deLavaud Cores, Machine Shop, Melting, Shipping. The same 23 job titles as to which the IAM had jurisdiction were divided among five such units; i.e., Blacksmith Shop, Machine Shop, deLavaud Pipe Cutters and Drillers, Mechanical Maintenance-Welding, and Physical

---

5/ The decription in the contracts of the seniority units as "departments" is somewhat misleading, for it is clear that the units were more numerous than the operating departments of the company.

Testing Laboratories. The four positions as to which the Patternmakers had jurisdiction were in a single seniority unit. The other three unions, each of which represented but a single craft position (journeyman and apprentice), were apparently treated as separate seniority units.[6/]

Seniority for purposes of promotion, layoffs, and recalls was based, with few exceptions, upon continuous service within a particular seniority unit. The Steelworkers and IAM contracts did contain provisions which permitted an employee accepting transfer to another seniority unit on a reduction in force to retain seniority in

---

6/ While the Boilermaker and IBEW contracts described seniority as being plantwide, the special language relating to seniority of apprentices indicates that seniority was being measured on the basis of service in positions represented by such unions.

the old unit (while beginning to build seniority in the new unit) until offered recall back to the old unit, at which time an election between the two would have to be made. The Steelworkers 1968 and 1971 contracts also provided for bidding on vacancies in other Steelworkers' seniority units, and their 1971 contract provided for plant-wide service to be used on reductions in force to roll junior employees on the some 35 lowest-paid Steelworker positions. None of the contracts provided for transfers between seniority units represented by different unions, and it is clear from the evidence that, when that did occur, the emplyee was treated in the new unit as a new employee for seniority purposes.

The January 1975[7] agreements between the company and the four[8] remaining unions adopted a form of plant-wide seniority. In each contract seniority was to be measured by plant continuous service and vacancies were to be posted for bids on a plant-wide basis. Use of this seniority, however, on reduction in force was basically restricted to positions represented by the same union, with bumping across union lines allowed only at the lowest paid positions, and journeymen were protected against displacement by other than journeymen of

---

7/ A gap between collective bargaining agreements of almost three months was occasioned by a strike at the expiration of the 1971-74 contract.

8/ In the latter half of 1972 the General Foundry and the Pattern Shop were closed. Thereafter the Patternmakers and Molders unions ceased to represent any employees at the Bessemer plant.

the came craft. Moreover, a union preference rule was adopted for promotions, requiring that vacancies be "offered first" to members of the union having jurisdiction over the position. In the 1977 contracts this promotional preference was reworded as "considered first", and restrictions on the frequency of transfers were imposed.

Seniority systems such as in effect at U.S Pipe's Bessemer plant since 1968 -- allowing for only limited use of plant service in the event of transfers between seniority units and containing no "rate retention" provisions -- have long been recognized in this and other circuits as having a discriminatory effect in industrial settings where blacks were discriminated against in initial job assignments. This principle has not been undermined by International Brotherhood of Teamsters v. United States, 431 U.S. 324,

14 FEP Cases 1514 (1977). In Teamsters, the Supreme Court did not hold that there would be no discriminatory impact from such inhititious upon transfers, but rather held that, upon due showing of the bona fides and non-discriminatory purposes of such a seniority system, immunity from Title VII liability would be provided under 42 U.S.C.A. § 2000e-2(h). So, in this case -- leaving aside for the moment whether the standards of § 2000e-2 (h) have been satisfied -- it is clear that a prima facie showing of liability under Title VII has been made if there has been discrimination in initial job assignments among the various seniority units. See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 15 FEP Cass 827 (CA5 1977), cert. denied, 434 U.S. 1034, 16 FEP Cases 501 (1978).

The evidence presented at this trial[9/] establishes a history of racial discrimination by the company in making initial job assignments. Not only were there virtually no assignments of blacks to positions represented by the craft unions, but even in assignments to the various non-craft positions represented by the predominantly black Steelworkers a color-conscious pattern is obvious. There were at this plant -- as has been found to be true in many other industrial plants in the area -- jobs and seniority units that were for practical purposes reserved either for whites or for blacks. As late as 1971,

---

9/ As earlier indicated, this and related findings are not binding upon the company, which -- if the proposed settlement be rejected -- would be given the opportunity to present other evidence for the court's consideration.

some time after the company had made changes in its assignment policies, there remained nine one-race Steelworkers' seniority units with more than one employee.

It is unnecessary for purposes of this decision to determine when this discrimination by the company ceased. Nor it is necessary to determine whether this assignment policy had adverse economic impact upon blacks, Swint v. Pullman Standard, 539 F.2d 77, 13 FEP Cases 604 (CA5 1976), although here it is clear that the earnings rates in white-only seniority units were higher than those in black-only seniority units. Nor is it necessary at this stage of the proceedings to determine how many, or which, black employees were injured during the period at issue in the litigation by the discrimination-perpetuating seniority system. It suffices to note that the seniority system has been shown to have

a discriminatory impact upon black employees.

This determination of prima facie liability does not, however, necessarily mean that the unions, local and international, are to be held legally responsible under Title VII or § 1981 for the consequences of the seniority system. See James, supra, 559 F.2d at 353-54. The concepts of culpability, or relative culpability vis-a-vis that of the company, as noted in James, will be considered later in this opinion. At this point the court notes that the 1971 contract with the Molders was solely with the local union -- the international was not a party to it, did not sign it, and so far as appears did not participate in its negotiation or implementation. Under Sinyard v. Foote & Davies, 577 F.2d 943, 17 FEP Cases 1344 (CA5 1978), the prima facie liability of

the International Molders and Allied Workers Union is limited to the period from October 4, 1971, one year before filing the lawsuit, to October 31, 1971, the expiration date of the last contract in which it had in any way participated.[10/]

III. THE BONA BIDES AND PURPOSES OF THE SENIORITY SYSTEM.

This court hs previously held that the burden of persuasion on a claim of immunity under § 2000e-2(h) is upon the

---

10/ The period of prima facie liability for Molders' Local 342 is from December 23, 1968, to July 1972; for the Patternmakers League of North America from Octtober 4, 1971, to November 1972; and for the Patternmakers Association of Birmingham from January 26, 1969, to November 1972. The periods of prima facie liability for the local and international Boilermakers and IAM are from the applicable limitations dates, earlier discussed, to the present time, although it is clear that the adoption of modified plant service in January 1975 has had ameliorating effects for many black employees.

defendants. Swint v. Pullman Standard, 17 EPD 8604, 17 FEP Cases 730 (N.D. Ala. 1978). The court there also analyzed the standards by which such a defense is to be measured under the Teamsters and James decision -- an analysis which need not here be repeated other than to emphasize that the factors outlined in James for special consideration are "ultimately but aids, or focal points, for deciding 'whether there has been purposeful dsicrimination in connection with the establishment or continuation of a seniority system,' which is in turn 'integral to a determination that the system is or is not bona fide.'" 17 EPD at 7105, 17 FEP Cases at 739.

A. Neutrality of the System.

The provisions in the seniority rules which precluded (and after 1975 limited) use of plant service upon transferring between jobs represented by different unions

were facially neutral. That is, by their wording they applied equally to all whites as well as to all blacks. Likewise, the evidence establishes that in actual operation these provisions were applied in a uniform manner without regard to race or color of the employee.

The plaintiffs assert that these inhibitions upon the transfer affected more blacks than whites. To the extent this argument is based upon the fact that there were more black production and maintenance employees than white it is clearly correct but of little significance.[11/] Of greater merit is their position that, when the economic disparities of the different se-

---

11/ It could hardly be argued that the greater the percentage of black workers, the more suspect the seniority system, and vice versa.

niority units are considered, a much larger percentage of blacks than whites would have had reason to desire transfer but for loss of seniority under the rules. As noted in Swint, supra, this argument has some similarity to a proposition rejected by the Fifth Circuit in the earlier Swint decision, 539 F.2d 77, 13 FEP Cases 604 (CA5 1976). The argument futher assumes that all employees would have the requisite abilities and aptitudes (whatever those may be) for entry into craft positions whereas it may well be that the inhibitions to transfer into a given craft union had more actual impact upon white craftsmen in other units than upon black production workers.

In any event, the plaintiffs' argument on this point is virtually foreclosed by Teamsters. In that case, as discussed in Swint, supra, 17 EPD at 7100, 17 FEP Cases at 733-34, more whites than non-whites in

absolute numbers, but a higher percentage of non-white than of white employees in relative terms, were inhibited by the seniority rules from transferring to the economically more desirable line-driver jobs. Yet, despite either disparity, the Court in Teamsters viewed the system as applying "equally to all races and ethnic groups." 431 U.S. at 355. By like token, the conclusion must be reached that the seniority system here under attack has been "neutral", applying equally to black and white.

B. Rationality of Seniority/ Bargaining Units.

The separation of several functionally related jobs into different seniority units casts an obvious shadow upon the system here under challenge. The explanation offered by the defendants is that there have been six different unions representing

production and maintenance employees, with the employees in some departments divided between two unions. These representational issues, the defendants say, were resolved in keeping with -- indeed, pursuant to elections directed by -- NLRB decisions. Implicit in the defendants' argument, and not challenged by the plaintiffs, is that structuring of seniority benefits to units which follow union lines has been, at least until recently, in accord with industry practice.[12/]

The plaintiffs meet this argument frontally, analyzing the development of the representational units and finding the units themselves to be inconsistent with

---

12/ It should be noted that, until the last decade, this approach to seniority has also been followed by the predominantly black Steelworkers. In their post-trial brief plaintiffs acknowledge (p. 8) that the departmental systems of seniority are not in issue in this case.

industry practice and, indeed, the product of racial animus over the years.

The basic components of the representational structure were defined as a result of elections directed by the NLRB in early 1940. See In the Matter of United States Pipe & Foundry Company and Steel Workers Organizing Committee, 19 NLRB No. 102, 21 LRRM 671 (1940). In this inter-union struggle for representation, five election units were designated in keeping with then prevailing NLRB policies, in each the industrial union (the predecessor of the Steelworkers) being pitted against the A.F. of L. Union.[13/]

That the elections had racial implica-

13/ It would be inaccurate to refer to the Molders as a craft union inasmuch as they were seeking to continue to reprsent all P&M workers not covered in the representational claims of the other A.F. of L. unions.

tions cannot be doubted. The Patttern-makers and IBEW were selected as representatives by small, all-white, all-craft election units. The IAM, which barred blacks from union membership, and the Boilermakers, which relegated blacks to inferior "auxiliary" lodges, were selected by units composed primarily of white craftsmen. The bulk of the employees, predominantly black, were in the fifth unit, and chose the Steelwokers over the Molders, the latter having apparently alienated many blacks by what were perceived to be discriminatory practices. It may be noted that, had the Steelworkers won any of the other elections, such units would have been combined with the fifth unit as a single bargaining element. On the other hand, had all the elections been reversed, there would have resulted the same basic separation between craft and noncraft units

which is at the root of the plaintffs' present attack.

The configuration of these original election units was not, however, irrational when viewed in the perspective of the existing conflict within the labor movement concerning craft and industrial unions. Nor were the claims made by the various unions at this time inconsistent with their own representational goals -- it being significant on this point that, notwithstanding discrimination against blacks within their own organizational structures, the IAM, the Boilermakers, and the Molders were nevertheless seeking to represent black employees at U.S. Pipe. While the outcome of the elections was no doubt affected by racial considerations -- by both blacks and whites -- it must be kept in mind that the national policy permitting self-determination by affected employees within

units determined under NLRB proceedings requires, by its very nature, tolerance for individual choices which may be the product of prejudice or otherwise ignoble. This is not to say that racial overtones involved in the initial certifications are unimportant in considering the bona fides of later seniority systems under all factors listed in James; it is rather to say that, despite these overtones, the original structuring of represenational units was rational and in accord with general NLRB procedents and common industry and union practice.

In 1949 the Molders were back before the NLRB, this time obtaining an order for a special representational election for a unit composed of molders, coremakers, and their apprentices. See In the Matter of United States Pipe and Foundray Company and International Molders and Foundry Workers Union, 84 NLRB No. 105, 24 LRRM 1331 (1949).

For this small, all-white, craft unit, the Molders won. In attacking this restructuring, the plaintiffs, in addition to emphasizing the racial composition of the new unit, argue that exclusion of the helpers (who were black) was inconsistent with the common organizational goals of the Molders. However, a reading of the NLRB opinion makes it apparent that the board's decision to permit the special election was based upon its policy to allow separate recognition of a group of skilled craftemen -- in essence, that the election would not have been allowed had helpers been included in the proposal. The court concludes that this restructiring, like the original certifications, is due to be treated as rational and consistent with NLRB precedents and standard industry and union practice. It is of interest that the NLRB opinion recites that there has been no

interchange between these positions and others in the same department during the nine-year period of representation by the Steelworkers. That is, the molders and coremakers had been treated as a separate seniority unit even when represented by the predominantly black Steelworkers.

In 1950 there were further changes in the union representation, this time independently of NLRB proceedings. It appears from business records that during the 1940's some shifts in union allegiance had taken place, with white employees in some Steelworker positions paying dues to the IAM or Boilermakers and with blacks in IAM and Boilermakers positions paying dues to the Steelworkers. The evidence, while scanty, indicates that this disaffection by these blacks resulted from their belief that they were being treated unfairly by their designated union representatives; the

reason for this action by the whites would, under the evidence, be only speculation.

In any event, in October 1950 agreements were entered by the company, Steelworkers, IAM, and Boilermakers, under which union jurisdiction over certain positions was altered. The Steelworkers gained jurisdiction over boilermaker helpres, over helpers from the blacksmith department, and over crane hokers -- all of whom were black. The Steelworkers ceded jurisdiction over flask patchers, over machine and crane operators, and over "Helpers (White) to be promoted to Millwright Trainee" --- all of whom were white. The IAM and Boilermakers became, like the other craft unions, all-white -- a situation that did not change until the mid-1960's.

These changes were certainly understandable -- solving an administrative problem for the company and satisfying the

desires of the thirty-seven job incumbents. While understandable, the changes were not, however, rational. It will be noted that inconsistent approaches are taken with respect to helper positions -- separating some (those with black incumbents) from their related skilled positions, while joining others (those with white incumbents) to their related skilled positions. Nor has it been shown that modification of board-certified units was in accord with common practice in the industry.

The establishment in the mid-1960's of the Group II Molder position had some of the atrributes of a change in union representation. This job, created when manufacturing changes were made by the company, was added to the unit represented by the Molders, and was filled by persons who had occupied Steelworker positions, including black Molder Helpers. This alignment was

certainly rational and, indeed, but for closing of the department in 1972, might have provided a route by which blacks would have progressed into craft positions.

In summary, the court concludes that -- with the exception of the positions involved in the 1950 inter-union transfers -- the bargaining units and in turn the seniority units were rational and in accord with NLRB precedents and common industry practice. The contrary conclusion is reached with respect to the jobs affected by the 1950 changes.

C. Genesis of Seniority System.

There can be no doubt that the seniority system was instituted at a time of widespread racial discrimination -- in the plant, in the unions,[14/] and in the commu-

---

14/ The evidence in its cause does support the finding, as was also true in Swint, supra, 17 EPD 7103-04, 17 FEP Cases at 738,

nity as a whole. There is no need even to recite here the evidence presented in this cause to show that discrimination, or to consider the propriety of taking judicial notice of such matters.[15/] Moreover, as was discussed supra, racial condiderations were involved in the 1940 elections which produced the bargaining units and in the 1950 inter-union transfers of certain positions between bargaining units.

14/ continued

that the Steelworkers constituted "one of the few institutions in the area which did not function in fact to foster and maintain segregation." 17 EPD 7104, 17 FEP Cases at 738.

15/ By footnote in a recent decision, the Supreme Court has, without apparently considering the limitations of Rule 201 of the Federal Rules of Evidence, indicated that judicial notice could be taken of the exclusion of blacks from craft positions. See United Steelworkers v. Weber, 443 U.S 193, 47 LE 4851, 4852 n.1, 20 FEP Cases 1 (June 27, 1979).

The decision that this factor should be resolved "in favor of" the plaintiffs' position in this litigation does not mean that the seniority system necessarily falls outside the immunity of 42 U.S.C.A. § 2000e-2(h).[16/] This factor is but one of several focal points for consideration and, as noted in Swint, supra, 17 EPD at 7103, n.20, 7107, 17 FEP Cases at 737, is not dependent upon a finding of causative relationship between racial discrimination and the seniority system itself.

D. Purposes of Seniority System.

The fourth factor is "whether the sys-

16/ To the extent, as argued by plaintiffs, that Chrapliwy v. Uniroyal, Inc, 15 EPD ¶ 7933, 15 FEP Cases 822 (N.D. Ind. 1977), can be read as holding unavailable the § 2000e-2(h) immunity for all seniority systems which were adopted at a period of racial discrimination, this court disagrees, believing that construction to be inconsistent with Teamsters and James.

tem was negotiated and has been maintained free from any illegal purpose." James, supra, 559 F.2d at 352. Extensive evidence has been presented to the court concerning the postures and proposals of the parties during the ecollective bargaining negotiations of 1968 and subsequent triennial sessions; the positions of the parties with respect to earlier agreements is left largely to inference.

It appears that the fundamental characteristic of this seniority system remained constant from formal unionization in 1940 to the early 1970's -- that is, allowing exercise of seniority for promotions, layoffs, and recalls only as among employees of the same union working in the same department and measuring that seniority by the length of employment in the particular seniority unit. This type of seniority, which has been commonplace un-

til relatively recently, was the form adopted by the all-white unions (IBEW and Patternmakers), by the predominantly-white unions (IAM and Boilermakers), and by the predominantly-black union (Steelworkers). It was the form adopted by the Molders when they gained recognition in 1949. The court concludes that in each instance the system was adopted for other than racial reasons. More particularly, it is clear that the failure by the craft unions to adopt a system allowing employee transfer with carryover of seniority was not due to a fear of black encroachment -- it was rather to protect against competition from other white craftsmen.

The alterations to the seniority units which occurred in 1950 stand on a different footing. The court views these changes as racially motivated -- intended to, and effecting, increased seniority security

for certain whites (by removing them from a Steelworkers' unit and by placing them in a craft union from which blacks were concurrently removed) as well as increasing promotional opportunities for some of them (placement as Millwright trainees).

A system of plant-wide seniority was, as previously indicated, instituted in the 1975 contracts with the unions which then remained i.e., the Steelworkers, IAM, IBEW, and Boilermakers. As might be expected, agreement to such a fundamental change did not occur over night. Back in 1968 negotiations the company had indicated a willingness to consider transfers between bargaining units without forfeiture of seniority. While nothing came of this suggestion, the Steelworkers and IAM contracts did provide for retentions of seniority on intra-union transfers during a reduction in force, and the Steelworkers

contract provided for bidding on vacancies in other Steelworkers' seniority units, though on the basis of departmental age. In the 1971 negotiations the company proposed to the unions a form of plant-wide seniority for inter-unit transfers; and an "Inter-union Seniority Agreement" was actively discussed among the various unions. Accord, however, was not reached -- not only because as plaintiffs emphasize, of resistance by some of the craft unions, but also because of division within the Steelworkers union. It should be noted that the 1971 Steelworkers contract retained the concept of departmental age for promotional purposes, and permitted sue of plant-age on layoffs only at the lowest-paid Steelworker positions. The limitations placed under the 1975 and 1977 agreements upon use of plant-wide seniority -- i.e., the union preference on promotions

and provisions that journeymen would not be displaced on reductions by other than journeymen of the same craft -- constituted a joint union proposal, the Steelworkers not pressing for adoption of the broader-form company proposal in order to present a common union front.

Racial considerations were involved in the 1968, 1971, 1975, and 1977 negotiations concerning the modification of seniority, but in an unusual way. The clear message conveyed upon a reading of the negotiation minutes, and substantially confirmed by the testifying witnesses, is that racial considerations were involved, not in opposing the changes in the seniority system, bur rather in proposing those changes. The push for change -- which was primarily by the company and to a lesser degree by the Steelworkers -- was largely motivated by a fear of the outcome of claims being pressed

administratively and later in court under Title VII. The concern was that the seniority system -- without regard to its bona fides and purposes, for Teamsters had not yet been decided -- would create liability for prior discrimination and in any event result in court-ordered plant-wide seniority. This is not to say, of course, that the Steelworkers' bargaining representatives were not also motivated by a growing awareness of increased promotional opportunities afforded by a broader seniority system -- a fact, however, which had not prompted Steelworker negotiation proposals in the 1940-68 period. As broadened seniority came to be seen by Steelworkers as increasing their opportunities, it was also perceived by members of the craft unions as threatening their job security -- and it was this latter perception not the color of their potential com-

petitors, which caused their resistance to the change in seniority. Their opposition ultimately yielded, but only when confronted by firmness in the company's position and by the then apparent certainty (pre-Teamsters) of judicial intervention -- a point highlighted by their continued insistance on protection in the event of layoffs against their fellow white craftsmen.

In summary, the court concludes that, with the exception of the changes in the system effected by the 1950 transfers, the seniority system here under challenge was negotiated, and has been maintained, free of any purpose of racial discrimination.

E. Totality.

The court is called upon under James to use the four factors as aids for decid-

ing "whether there ha been purposeful discrimination in connection with the establishment or continuation of a seniority system", which is in turn "integral to a determinatin that the system is or is not bona fide." 559 F.2d at 351. The "genesis" factor is decided favorably to the plaintiffs' position with respect to the entire seniority system, provided, that is, that the factor be evaluated without regard to any causative relationship between the existence of discriminatory practices and the seniority system itself. The "neutrality", or equal application, factor is decided favorably to the defendants' position with respect to the entire seniority system. The "rationality" and "purposes" factors are decided favorably to the plaintiffs with respect to certain changes in jobs effected in 1950, but in other respects favorably to the defendants.

The four factors are not stones to be placed mechanistically on an imaginary scale. Looking however to these factors and, indeed, to the totality of the system, the court concludes, with one exception, that the sytem has been "bona fide"; that the differrences in terms, conditins or privileges of employment resulting thereunder have not been "the result of an intention to discriminate" because of race or color; and that the defendants have met the burden of proving the applicability of 42 U.S.C.A. § 2000e-2(h).

The one exception relates to the transfer of certain jobs in 1950 between seniority units. The differences in seniority units. The differences in terms, conditions and privileges of employment resulting from these transfers are the result of an intention to discriminate because of race and color and accordingly

are not protected under § 2000e-2(h).[17/]

IV. Liability

It is appropriate to call for a second stage of trial, in which class members -- now armed with a presumption of discrimination -- can present individual claims for damages. These claims will be quite limited; i.e., during the applicable period they were injured by virtue of jobs not having remained in the seniority units to which they were allocated prior to the 1950 agreements.

Liability for such claims as may be established is due to be fixed upon Lodge

---

17/ The question may well be asked whether some aspects of a seniority system can be immunized under § 2000e-2(h), while others not. While an affirmative response is given under the facts of this case, the court can envision circumstances in which the pernicious portion of a system would effectively poison the system as a whole. That is not the situation here.

359 of the IAM respecting those positions switched beteen the Steelworkers and the IAM and upon Local 583 of the Boilermakers respecting those switched between the Steelworkers and the Boilermakers. The Internationals of the IAM and Boilermakers are not shown to have been sufficiently involved in these 1950 agreements to justify charging them with responsibility therefor. The Steelworkers, while a party to these agreements, do not apear to have acted from any racial animus -- having rather merely accepted additional blacks who felt discrimination in their certified union and having released whites who apparently preferred representation by an all-white union. The Patternmakers, Molders, and IBEW are likewise not chargeable with responsibility in connection with these agreements, to which they were not even parties.

The applicable period of damage claims will begin on January 13, 1969, with respect to the potential liability of IAM Lodge 359, and on January 26, 1969, with respect to that of Boilermakers Local 583. The defendants have asserted that, with declining employment at the plant and with elimination of apprenticeship programs, there were very few vacancies after these dates. It may also be that class members who may make claims with respect to such vacancies may be shown not to have the necessary qualifications for such positions. These, however, are matters which are for consideration during a second stage of trial, and not at this point.

V. Conclusion

With respect to the aspect of the seniority system found to violate Title VII,

the court will order injunctive relief[18/] and will provide for a second trial to determine the liabiliity of IAM Lodge 359 and Boilermakers Local 583 for back pay, costs, and attorneys fees.[19/] All parties are directed to proceed with preparations for sending of notice to class members concerning the proposed settlements, which notices shall indicate the substance of this ruling.

/s/ Sam C. Pointer, Jr.
UNITED STATES DISTRICT JUDGE

18/ The agreement proposed by the parties covering injunctive relief, if approved by the court, may resolve this issue.

19/ The award of attorneys fees against the two unions will take into account the limited degree to which the plaintiffs have been "prevailing parties" in this litigation. The extent to which claims for back pay against these unions may be affected by distribution of settlement funds (if the settlement be approved) contributed by the company will for consideration in subsequent proceedings.

Supplemental Brief

Office - Supreme Court, U.S.
FILED
APR 28 1982
ALEXANDER L. STEVAS,
CLERK

Nos. 81-1029, 81-1069, 81-1118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH TERRELL, JR., ET AL.,
Petitioners, No. 81-1069

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Respondents, No. 81-1069

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO, LOCAL 342, ET AL.,
Petitioners, No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,
Petitioners, No. 81-1118

v.

JOSEPH TERRELL, JR., ET AL.,
Respondents, Nos. 81-1029, 81-1118

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF

[List of attorneys on inside cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

Cases: Page

American Tobacco Co. v. Patterson, 50 U.S.L.W. 4364 (April 5, 1982) 2

James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1977) 3

Love v. Pullman Co., 404 U.S. 522 (1972) 3

Pullman-Standard v. Swint, Nos. 80-1190, 80-1193 (April 27, 1982) 2-4

Zipes v. Trans World Airlines, Inc., 50 U.S.L.W. 4238 (Feb. 24, 1982) 2-3

Other:

Rule 52(a), Federal Rules of Civil Procedure..... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

Nos. 81-1029, 81-1069, 81-1118

JOSEPH TERRELL, JR., ET AL.,
Petitioners, No. 81-1069

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Respondents, No. 81-1069

INTERNATIONAL MOLDERS AND ALLIED WORKERS UNION, AFL-CIO, LOCAL 342, ET AL.,
Petitioners, No. 81-1029

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, ET AL.,
Petitioners, No. 81-1118

v.

JOSEPH TERRELL, JR., ET AL.,
Respondents, Nos. 81-1029, 81-1118

On Writs of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

SUPPLEMENTAL BRIEF

In light of *Pullman-Standard* v. *Swint*, Nos. 80-1190, 80-1193 (April 27, 1982), and *Zipes* v. *Trans World Airlines, Inc.*, 50 U.S.L.W. 4238 (Feb. 24, 1982), plaintiffs Terrell, et al., respectfully submit that their petition, No. 81-1069, should be granted and the petitions of the union defendants, Nos. 81-1029, 81-1118, should be denied. Alternatively, if the petitions of the union defendants are granted, they should be accepted for briefing and argument and not disposed of summarily.

1. In their petition, Terrell, et al., raise the issue of how and when a defendant must be "named" in a charge filed with the Equal Employment Opportunity Commission in order to be subject to suit under Title VII. The most important category of cases in which this issue arises concerns whether, and if so how, an aggrieved employee must separately name the international union as well as the union local in order to be able to sue the international in a Title VII action. Petition, No. 81-1069, pp. 39-41. In suits involving a challenge to the legality of a seniority system, the issue concerning which unions may be sued is frequently, as in this case, of critical importance. Since the issue involves an all-or-nothing proposition—whether or not an international union may be liable to the victims of discrimination—the ambiguity in the law often prevents the compromise and resolution of a lawsuit even if a violation of law is established. Fair employment actions and especially those involving a challenge to seniority systems are often lengthy and complex, see e.g., *American Tobacco Co.* v. *Patterson*, 50 U.S.L.W. 4364, 4365 (April 5, 1982) (since the action was filed in 1969 there have been three appellate opinions and two trials); *Pullman-Standard Co.* v. *Swint*, *supra*, p. 3 n.2. Thus, it is especially important that a uniform standard replace the current many-sided conflict in the lower courts regarding a procedural issue which often arises in seniority cases.

2. This Court recently reaffirmed "a guiding principle for construing provisions of Title VII[:]. . . . a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process'." *Zipes* v. *Trans World Airlines*, 50 U.S.L.W. at 4241, quoting *Love* v. *Pullman Co.*, 404 U.S. 522 (1972). The technical standard applied by the lower court conflicts with *Zipes*. See Petition, 81-1069, pp. 41-44.

3. Eight union defendants filed two petitions, Nos. 81-1029, 81-1118, raising two basic questions. The first question concerns the standard for establishing whether or not a seniority system is "bona fide" and thus lawful under Title VII. While an important question, the proper legal standard was applied in this action.[1]

4. The second question raised by the union defendants concerns the proper standard for appellate review. As in *Swint*, this case involves a division of an industrial plant between an integrated and largely black Steelworkers' union and all-white unions which were formerly affiliated with the American Federation of Labor. See Brief in Opposition, Nos. 81-1029, 81-1118, pp. 3-4. Unlike in *Swint*, the seniority system as it applied to the all-white AFL Unions was directly in issue, the district court found that the Unions engaged in practices of racial discrimination, Appendix to Pet. 81-1118, p. 20b, and the district court found that at least part of the seniority system was created with an intent to discriminate, Brief in Opposition, *supra*, pp. 6, 13. This action presents a situation "in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard. . . ." *Swint*, *supra*, p. 16 n.19. Whether Rule 52(a) applies to

---

[1] The Eleventh Circuit applied the standard set forth in *James* v. *Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), which was approved in *Pullman-Standard Co.* v. *Swint*, *supra*.

a situation such as this one is a "much-mooted issue" which was not addressed in *Swint* and thus the decision of the appellate court should not be vacated or reversed in light of *Swint*.

5. In any case, the appellate court clearly and properly applied Rule 52(a) and determined that the entire seniority system—not just a part as found by the district court—was created and maintained with an intent to discriminate. Brief in Opposition, *supra*, p. 22.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in their Petition, Reply Brief, and Brief in Opposition, the plaintiffs Terrell et al. respectfully request that a Writ of Certiorari issue in No. 81-1069 and that a Writ of Certiorari not issue in Nos. 81-1029, 81-1118. Alternatively, if a Writ of Certiorari is issued in 81-1029 and 81-1118 the plaintiffs request that the questions accepted for review be determined after full briefing and argument.

Respectfully submitted,

JOSEPH P. HUDSON
1909 30th Avenue
Gulfport, Mississippi 39501

DANIEL B. EDELMAN
YABLONSKI, BOTH & EDELMAN
Suite 800
1140 Connecticut Avenue, N.W.
Washington, D.C. 20036

DEMETRIUS C. NEWTON
2121 8th Avenue North
Birmingham, Alabama 35203

BARRY L. GOLDSTEIN *
Suite 940
806 15th Street, N.W.
Washington, D.C. 20005
(202) 638-3278

JACK GREENBERG
JAMES M. NABRIT, III
O. PETER SHERWOOD
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Petitioners, 81-1069, Respondents, 81-1029, 81-1118

* Counsel of Record

Opposition

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1069

IN THE

Supreme Court of the United States

October Term, 1981

JOSEPH TERRELL, JR., ET AL.,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

JOHN J. BLAKE
General Counsel
BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO
374 New Brotherhood Building
Kansas City, Kansas 66101

JOSEPH P. MANNERS, ESQ.
General Counsel
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
Machinists Building
1300 Connecticut Avenue
Washington, D. C. 20036

J. R. GOLDTHWAITE, JR.
Counsel of Record
JAMES B. COPPESS
ADAIR & GOLDTHWAITE, P.C.
777 West Peachtree St., N.E.
Atlanta, Georgia 30308

CONTENTS

	Page
Table of Authorities	ii
I. Prefatory Analysis	1
II. Pattern of Decision	3
III. The Decisions in this Case Conform to the Pattern and Are Correct	7
IV. Anomaly of Petitioners' Contention	13
Conclusion	14
Statutory Provisions	Appendix

TABLE OF AUTHORITIES

Page

Bowe v. Colgate-Palmolive Company, 416 F.2d 711, 719, 2 FEP Cases 121, 126 (7th Cir. 1969) 4, 5

Canavan v. Beneficial Finance Corp., 553 F.2d 860 (3rd Cir. 1977) 6

Chastang v. Flynn and Emrich Co., 365 F.Supp. 957, 961-964, 6 FEP Cases 357 (D. Md. 1973) 5

Curran v. Portland Superintending School Committee, 435 F.Supp. 1063 (D.C. Me., 1977) 4

Davis v. Weidner, 596 F.2d 726 (7th Cir. 1979) 6

E.E.O.C. v. McLean Trucking Co., 525 F.2d 1007, 11 FEP Cases 833 (6th Cir. 1975) 4, 6

Eggleston v. Plumbers' Local 130, 657 F.2d 890 (7th Cir. 1981) 6

Escamilla v. Mosher Steel Company, 386 F.Supp. 101, 105, 9 FEP Cases 49, 51 (S.D. Tex. 1975) 6

Evans v. Sheraton Park Hotel, 164 U.S. App. D.C. 86, 503 F.2d 177, 8 FEP Cases 705 (1974) 4, 6

Gibson v. Local 40, Supercargoes and Checkers Union, 543 F.2d 1259, 1263, n.1 (9th Cir. 1976) 6

Glus v. Murphy Co., 562 F.2d 880 (3rd Cir. 1977), s.c. 629 F.2d 248 (1980) rev. on other grounds 449 U.S. 250 7

Hairston v. McLean Trucking Co., 62 F.R.D. 642, 661, 6 FEP Cases 779 (M.D. N.C. 1974) 6

Jamison v. Olga Coal Company, 335 F.Supp. 454, 460, 4 FEP Cases 532, 536 (S.D. W.Va. 1971) 6

Jenkins v. United Gas Corp., 400 F.2d 28, 30 n.3 (5th Cir. 1968) 10

Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354 (9th Cir. 1975) 11

LeBeau v. Libbey-Owens-Ford Company, 484 F.2d 798, 6 FEP Cases 1, 2 (7th Cir. 1973) 4

McDonald v. American Fed. of Musicians of U.S. and Can., 308 F.Supp. 664, 669, 2 FEP Cases 365, 369 (N.D. Ill. 1970) 5

Mickel v. South Carolina State Employment Service, 377 F.2d 239, 1 FEP Cases 182, 65 LRRM 2328 (4th Cir. 1967) 4

TABLE OF AUTHORITIES (Continued)

Page

Miller v. International Paper Company, 408 F.2d 283, 1 FEP Cases 647, 70 LRRM 2743 (5th Cir. 1969)... 4

Norman v. Missouri Pacific Railroad, 414 F.2d 73, 85-86, 1 FEP Cases 863, 871-872, 71 LRRM 2940 (8th Cir. 1969)....4, 6

Ricks v. Delaware State College, 605 F.2d 710 (3rd Cir. 1979), rev. on other grounds 449 U.S. 250 (1980).. 7

Romero v. Union Pacific R.R., 615 F.2d 1303 (10th Cir. 1980).... 7

Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970).... 10

Scott v. University of Delaware, 385 F.Supp. 937, 940-942, 10 FEP Cases 1064, 1066-1067 (D. Del. 1972).... 5

Shehadeh v. Chesapeake & Potomac Telephone Co., 595 F.2d 711 (D.C. Cir. 1978).... 7

Sokolowski v. Swift and Company, 286 F.Supp. 775, 782, 1 FEP Cases 611, 616, 70 LRRM 2440 (D. Minn. 1968).... 6

Stith v. Manor Baking Co., 418 F.Supp. 150, 15 FEP Cases 515 (D.C. W. Mo. 1976).... 3

Taylor v. Armco Steel Corp., 373 F.Supp. 885, 911, 8 FEP Cases 979, 999 (S.D. Tex. 1973).... 6

Terrell, et al., v. United States Pipe and Foundry Co., 6 FEP Cases 1027, 1028, 1029.... 8

Tillman v. City of Boaz, 548 F.2d 592 (5th Cir. 1977)....10, 11

Watson v. Gulf & Western Industries, 650 F.2d 290 (9th Cir. 1981).... 7

Williams v. General Foods Corp., 492 F.2d 399, 404, 7 FEP Cases 827, 830 (7th Cir. 1974).... 4

STATUTORY PROVISIONS

1964 Civil Rights Act....Appendix

Section 706(e) [42 U.S.C. § 2000e-5(e)]....*passim*

Section 706(f) [42 U.S.C. § 2000e-5(f)(1)]....*passim*

No. 81-1069

IN THE

Supreme Court of the United States

October Term, 1981

JOSEPH TERRELL, JR., ET AL.,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

I.

Prefatory Analysis

The petition for writ of certiorari in this case is very skillfully contrived by the device of dissecting a number of circuit court and district court decisions into unrelated details and using each detail out of context as an element of confusion to establish a claim of conflict.

If the cases are considered in factual context, as they should be, they demonstrate a remarkable consistency in interpreting and applying the requirement of Section 706(f)(1) of the 1964 Civil Rights Act [42 USC, §2000e-5(f)(1)] that:

> . . . a civil action may be brought against the respon-

dent *named in the charge* . . . . (Emphasis supplied).

The central thrust of most, if not all, of the decisions is to give effect to the Act by providing a remedy for discrimination, but at the same time to preserve due process in the enforcement of the Act as required by Section 706(f)(1).

It is necessary for the purposes of this case to consider the decisions upon the basis of the parties necessary to the provision of affirmative remedial relief, and on the other hand, on the basis of the parties against whom monetary damages (back pay, attorney fees, etc.) may be awarded after affirmative remedial relief has been provided. The decisions have been liberal in permitting action against parties who are necessary for the provision of affirmative remedial relief, as they should be, so as to give effect to the purpose of the Act to eliminate discrimination in employment, and most of the cases fall into this first category; but the issue in the present case was narrow—against what parties may monetary relief be granted, *after* affirmative remedial relief has been provided, in the light of the statutory requirements that (1) a charge must be filed within 180 days after the act of discrimination [42 USC, §2000e-5(e)], and (2) only parties named in the charge may be joined in a legal action [42 USC, §2000e-5(f)(1)].[1]

The petition for certiorari does not distinguish between the decisions which relate to joining parties for the purpose of providing affirmative remedial relief and those which relate to the application of the statutory limitation to the requirement of naming parties in the charge for back pay purposes; and such a distinguishment would be difficult

---

[1] Statutory provisions reproduced in Appendix, *infra*.

because, from our review of the cases, it appears that the present case is the *only* case in which this distinction has been critical to decision and which relates *only* to the application of the statutory limitation to back pay claims upon the basis of parties named in the charge.

Consequently, the present case presents no conflict with any other decision. Furthermore, the present case was properly decided and is in basic accord with the pattern of decision on related issues in other circuits.

II.

The Pattern of Decision

The courts have properly regarded the requirements of Section 706(f)(1), that suit may be brought only against a party named in the charge, as a due process requirement. Accordingly the requirement has been relaxed where an unnamed party had actual notice of the charge or where an unnamed party was effectively represented in the charges upon vicarious principles.[2] Action against a party necessary for the provision of affirmative remedial relief has also been permitted under FRCP 19, even though the party was not named in an EEOC charge; but in no case does it affirmatively appear that monetary relief was allowed against a party who was not charged unless that party had received notice of the charge or was vicariously represented in the charge.

A scholarly and accurate analysis of all decisions as to the application of Section 706(f)(1) up to 1976 is set forth in *Stith v. Manor Baking Co.*, 418 F.Supp. 150, 15

---

[2] This has properly been considered to be a factual determination to be made upon a case-by-case basis.

FEP Cases 515 (D.C. W. Mo., 1976).[3]

The *Stith* analysis follows:

> Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, Section 2000e-5(f)(1), Title 42, United States Code, provides that if a charge filed with the EEOC is dismissed, or if neither the EEOC nor the Attorney-General of the United States has filed a civil action,
>
> > ". . . a civil action may be brought *against the respondent named in the charge* [A] by the person claiming to be aggrieved. . . ." (emphasis supplied). In a number of cases involving attempts to name as defendants unions which were not named as respondents in the EEOC charges, federal courts have held that
> >
> > "[i]t is a jurisdictional prerequisite to the filing of a suit under Title VII that a charge be filed with the EEOC against the party sought to be sued."
>
> *Bowe v. Colgate-Palmolive Company*, 416 F.2d 711, 719, 2 FEP Cases 121, 126 (7th Cir. 1969); *E.E.O.C. v. McLean Trucking Co.*, 525 F.2d 1007, 11 FEP Cases 833 (6th Cir. 1975); *Evans v. Sheraton Park Hotel*, 164 U.S. App. D.C. 86, 503 F.2d 177, 8 FEP Cases 705 (1974); *Williams v. General Foods Corp.*, 492 F.2d 399, 404, 7 FEP Cases 827, 830 (7th Cir. 1974); *LeBeau v. Libbey-Owens-Ford Company*, 484 F.2d 798, 6 FEP Cases 1, 2 (7th Cir. 1973); *Miller v. International Paper Company*, 408 F.2d 283, 1 FEP Cases 647, 70 LRRM 2743 (5th Cir. 1969); *Mickel v. South Carolina State Employment Service*, 377 F.2d 239, 1 FEP Cases 182, 65 LRRM 2328 (4th Cir. 1967). See also: *Norman v. Missouri Pacific Railroad*, 414

---

[3] A review and approval of the *Stith* summary is contained in *Curran v. Portland Superintending School Committee*, 435 F.Supp. 1063 (D.C. Me., 1977).

F.2d 73, 85-86, 1 FEP Cases 863, 871-872, 71 LRRM 2940 (8th Cir. 1969). There are two reasons for this rule:

> "First it notifies the charged party of the asserted violation. Secondly, it brings the charged party before the EEOC and permits effectuation of the Act's primary goal, the securing of voluntary compliance with the law." *Bowe v. Colgate-Palmolive Company, supra.*

See also. *Evans v. Sheraton Park Hotel, supra,* 503 F.2d at 183, 8 FEP Cases at 709. However, several exceptions to this general rule have been recognized.

First, it has been held that if there was a "substantial identity" between a respondent named in the charges filed with the EEOC, and the defendants in the civil action who were not named in the EEOC charges, subject matter jurisdiction exists over the defendants who were not named. E. g., *Chastang v. Flynn and Emrich Co.,* 365 F.Supp. 957, 961-964, 6 FEP Cases 357, (D. Md. 1973)—[trust committee members]; *McDonald v. American Fed. of Musicians of U.S. and Can.,* 308 F.Supp. 664, 669, 2 FEP Cases 365, 369 (N.D. Ill., 1970)—[secretary of local union]. But see: *Scott v. University of Delaware,* 385 F.Supp. 937, 940-942, 10 FEP Cases 1064, 1066-1067 (D. Del. 1972)—[claims against trustees and officers of university not named in charges against university dismissed because those individuals did not participate in the conciliation process].

Second, several courts have held or stated that subject matter jurisdiction exists over a defendant not named as a respondent in the EEOC charges, if that defendant so controlled the activities of a named respondent that the named respondent acted as its "agent", at least when that defendant had notice of and participated in the conciliation process. *Mickel v. South Carolina State Employment Service, supra,* 377 F.2d at 241, 1 FEP Cases at 184 [dictum—state em-

ployment service held not to be "agent" for defendant employees]; *Escamilla v. Mosher Steel Company*, 386 F.Supp. 101, 105, 9 FEP Cases 49, 51 (S.D. Tex. 1975)—[parent of wholly owned subsidiary which either had, or should have had, notice of conciliation process]; *Hairston v. McLean Trucking Co.*, 62 F.R.D. 642, 661, 6 FEP Cases 779 (M.D.N.C. 1974)—[combination of facts that initials of defendant appeared in EEOC charge and that "close relationship" existed between that defendant and the defendant named as respondent held sufficient]; *Taylor v. Armco Steel Corp.*, 373 F.Supp. 885, 911, 8 FEP Cases 979, 999 (S.D. Tex. 1973)—[local union acted as "agent" for international, but jurisdiction over international existed on other grounds]; *Sokolowski v. Swift and Company*, 286 F.Supp. 775, 782, 1 FEP Cases 611, 616, 70 LRRM 2440 (D. Minn. 1968)—[dictum—local union not "agent" of international]. But see: *Jamison v. Olga Coal Company*, 335 F.Supp. 454, 460, 4 FEP Cases 532, 536 (S.D. W.Va. 1971).

Finally, jurisdiction over a defendant not named as a respondent has been held to exist when the defendant is joined as an "indispensable party" under Rule 19 of the Federal Rules of Civil Procedure, e. g. for interpretation of a collective bargaining agreement. *E.E.O.C. v. McLean Trucking Co., supra; Evans v. Sheraton Park Hotel, supra*, and cases cited therein, 503 F.2d at 177. Cf. *Norman v. Missouri Pacific Railroad, supra*, which suggested that new charges naming the indispensable party as a respondent be filed with the EEOC to give the party an opportunity to participate in the conciliation process.

15 FEP Cases, at 519, 520.

Subsequent circuit court decisions have conformed to the pattern of decision presented in the *Stith* summary.[4]

[4] Cf: *Canavan v. Beneficial Finance Corp.*, 553 F.2d 860 (3rd Cir. 1977); *Davis v. Weidner*, 596 F.2d 726 (7th Cir. 1979); *Eggleston v. Plumbers' Local 130*, 657 F.2d 890 (7th Cir. 1981); *Gibson v. Local 40*,

III.

The Decisions in This Case Conform to the Pattern and Are Correct

As stated at the outset, the issue in this case was limited to the application of time limitations to back pay claims. The District Court held that the International Unions [5] were properly parties in the action for purposes of affirmative remedial relief. In 1973, the District Court found:

> It appears without dispute that the initial charge before the EEOC did not name the internationals as parties against whom charges were brought. This initial failure to so name and identify the internationals may have significance in the future as to some aspects of the claims of the plaintiffs. . . .
>
> . . .
>
> Such internationals may be needed if, ultimately, there should be a decision that involves modification of the collective bargaining agreements; they may be involved if some form of injunction that directs action to be taken of a non-discriminatory nature results. While it is not clear that the local is an agent of the international, nor that the international is an agent for the local in either union, some features of both type relationships can be found. That is, to some degree the international serves as an agent for the local, and in other respects the local is subservient to the international. I find it unnecessary to try to place

---

Supercargoes and Checkers Union, 543 F.2d 1259, 1263, n.1 (9th Cir. 1976); *Glus v. Murphy Co.*, 562 F.2d 880 (3rd Cir. 1977), s.c. 629 F.2d 248 (1980) rev. on other grounds 449 U.S. 250; *Ricks v. Delaware State College*, 605 F.2d 710 (3rd Cir. 1979), rev. on other grounds 449 U.S. 250 (1980); *Romero v. Union Pacific R.R.*, 615 F.2d 1303 (10th Cir. 1980); *Shehadeh v. Chesapeake & Potomac Telephone Co.*, 595 F.2d 711 (D.C. Cir. 1978); *Watson v. Gulf & Western Industries*, 650 F.2d 290 (9th Cir. 1981).

[5] International Association of Machinists and Aerospace Workers and Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers.

> a legal definition on the exact relationships between the international and the local, other than to say that in this case they do act sufficiently in concert so that the relief sought by the plaintiffs may require the presence of the international. Consequently, the internationals are due to be retained as party defendants and to continue in the litigation for further purposes. Of course, this hearing does not determine liability of the internationals, but rather only indicates and finds that the internationals must stay in the litigation as the case proceeds toward decision on the merits and, in effect, determines that the local unions are not the only parties against whom relief might be sought by the plaintiffs in these particulars.

Terrell, et al., v. United States Pipe and Foundry Co., 6 FEP Cases 1027, 1028, 1029.

In the 1979 decision, *after* the parties had agreed upon an affirmative action remedial decree, the District Court specifically noted that the issue as to the failure to name the International Unions in the original charge was very limited in scope and was restricted to the application of the 180 day limitation upon the back pay claims against the International. The Court held (22 FEP Cases, at 1697; Petitioner's appendix, pp. 67a-69a):

> It is, however, appropriate at the outset to note that the claims of discrimination on which liability of the unions in this action may be premised are far more limited in duration under applicable periods of limitation. Claims under Title VII may be based on employment practices which preceded the filing of an EEOC charge naming such party by 180 days (plus ending holidays); those under 42 U.S.C. 1981 may be based on practices which preceded the filing of the lawsuit by one year. Upon a consideration of the filing of charges with the EEOC, which were introduced into evidence, and of the filing of the complaint in this case, of which the court takes judicial notice, it ap-

pears that the following are the earliest dates on which liability can be premised: December 23, 1968, as to Molders' Local 342; January 13, 1969, as to IAM Lodge 359; January 26, 1969, as to Boilermakers Local 583 and as to the Patternmakers Association of Birmingham; and October 4, 1971, as to the four international labor organizations. Without merit are the plaintiffs' attempts to establish longer periods of limitations against the international unions on the basis of amended Title VII charges [3] or on the basis of pretrial waiver.[4]

The Circuit Court specifically affirmed the District Court findings that the original charges had afforded no notice to the E.E.O.C., and hence none to Respondents, that Respondents were involved in the charges.[6] The

---

[3] It is clear from the reading of the amended EEOC charges dated August 2, 1973, which were prepared with the assistance of counsel experienced in discrimination matters, that the international unions were being *added* as respondents. The EEOC's earlier findings and right-to-sue letters had, consistently with the wording of the original charges, treated only the local unions and company as respondents prior to that date. While the amended EEOC charges, even though filed ten months after the institution of the lawsuit, are certainly to be recognized as effective against the internationals when filed, it would be improper to treat them as "relating back" for limitations' purposes to the earlier charges.

[4] Leaving aside the legal dispute whether identification of respondents in EEOC charges is truly jurisdictional or not, plaintiffs' claim of a waiver by the internationals fails to take account of the fact that EEOC charges were filed (albeit not until August 1973) against the internationals. The potential problem arising from failure to name the internationals in the original charges was noted in open court back in October 1973 as one which would involve further study. See 7 EPD §9055, 6 FEP Cases 1027. The international unions have not waived their rights to contest the periods covered by the EEOC charges.

[6] The decision of the District Court as to naming of parties and lack of notice was a factual determination and the Circuit Court properly declined to set aside this portion of the District Court's findings.

Circuit Court upheld the District Court conclusion that the 180 day time limitation had not been triggered against the Internationals as to *back pay claims*, since the Internationals had not been named and received no notice of the original charges. The Court said:

> We begin with certain well-established principles. The remedial purposes of Title VII, and the paucity of legal training among those whom it is designed to protect, require that a court construe an EEOC charge with the utmost liberality. *E. g., Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977) (liberality required in interpreting the parties named); *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970) (liberality required in interpreting the discrimination alleged). "For a lay-initiated proceeding it would be out of keeping with the Act to import commonlaw pleading necessities to this 'charge,' or in turn to hog-tie the subsequent lawsuit to any such concepts." *Jenkins v. United Gas Corp.*, 400 F.2d 28, 30 n.3 (5th Cir. 1968). A court called upon to interpret such a charge must bear in mind that a fundamental purpose of the charge is to trigger an investigation by the EEOC. "All that is required is that [a charge] give sufficient information to enable EEOC to see what the grievance is about." *Id.* The necessity for equally broad interpretation of such a charge at the administrative and judicial levels stems from the framework of Title VII and its goal of encouraging voluntary compliance through EEOC conciliation.
>
> The Commission, which must operate on the basis of the administrative charge, rarely drawn by an attorney, must therefore view the charge in its broadest reasonable sense in order to effectively attempt to eliminate, by the administrative process, the discriminatory practices and policies which it finds. . . . Lacking enforcement powers, the Commission's disputes resolution machinery could not succeed if the federal courts were not in

> a position to review the complaint filed in a section 706 proceeding as broadly as the Commission views the charge.

Sanchez, 431 F.2d at 467 (quoting the amicus brief of the EEOC); see *Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977) (deference should be given to EEOC interpretation of a charge). Such policy considerations have caused this court to adopt a rule of reason which permits the scope of a Title VII suit to extend as far as, but no further than, the scope of the EEOC investigation which could reasonably grow out of the administrative charge.

> The logic of this rule is inherent in the statutory scheme of Title VII. A charge of discrimination is *not* filed as a preliminary to a lawsuit. On the contrary, the purpose of a charge of discrimination is to trigger the investigatory and conciliatory procedures of the EEOC. . . . Only if the EEOC fails to achieve voluntary compliance will the matter ever become the subject of court action. Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than the words of the charge which originally triggered the investigation.

Sanchez, 431 F.2d at 466.

The reasonable limits of an investigation potentially triggered by an EEOC charge define not only the substantive limits of a subsequent Title VII action, but also the parties potentially liable in that action. *See, e. g., Tillman v. City of Boaz*, 548 F.2d 592 (5th Cir. 1977); *Kaplan v. International Alliance of Theatrical and Stage Employees*, 525 F.2d 1354 (9th Cir. 1975). In *Kaplan*, the Ninth Circuit focused upon a factual statement in an EEOC charge which explicitly named only a local union, but which necessarily implicated an international union in the alleged discrimination. The court reasoned that the fact that a contract specifically complained of had

clearly been negotiated by the International sufficed to apprise the EEOC in "general terms" of the possible complicity of the International. The *Kaplan* court held that such general notice to the EEOC was sufficient to permit the International to be named as a defendant in a subsequent suit under Title VII. In so holding, the court relied primarily upon well-established rulings of this court.

644 F.2d, at 1124.

Our more recent decision in *Tillman v. Boaz* again looked to the factual allegations of an EEOC charge, and the scope of ensuing EEOC efforts, in liberally interpreting the parties named in the charge. In *Tillman*, we held that the City of Boaz, Alabama, was liable under Title VII although it was not specifically named as a respondent, because a letter to the EEOC, specifically incorporated by reference in the EEOC charges, stated that "I would like to file a claim against the City of Boaz . . . ." and the charges themselves listed the City of Boaz as the employer who discriminated against the plaintiff. Pursuant to that letter and the accompanying charges, the EEOC investigated the City as well as its mayor, the named respondent. In that situation, we had no difficulty concluding that both the EEOC and the City had sufficient notice that the City was charged to justify imposing liability on the City.

Applying these precedents and principles favoring liberality to the facts now before us, we must nevertheless conclude that the Internationals were insufficiently implicated in the discrimination alleged in appellants' original charges to have reasonably triggered EEOC investigation of the Internationals. These charges failed to allege specific conduct which clearly implicated the Internationals. Quite reasonably, the EEOC then omitted the Internationals in its investigative and conciliatory efforts. The Internationals thus failed even to receive informal notice that they had been named through the Commission's

> administrative process. Apparently recognizing that they had made a serious, substantive mistake—not a mere technical error of pleading—appellants amended their original EEOC charges to explicitly name the Internationals. Without holding appellants to the same level of draftsmanship as trained attorneys, we are constrained by the facts in this case to uphold the decision of the district court that no liability of the Internationals under Title VII shall commence until 180 days prior to these 1973 amended charges.

644 F.2d, at 1123-1124.

Thus, the decision in this case was very narrow in scope. No other decision deals specifically with this issue—naming of parties in the charge as respects time limitations on back pay. Nevertheless the decision in this case follows the pattern of decision which upholds notice and due process and no issue worthy of this Court's attention is presented by this portion of the Circuit Court decision.

IV.

The Anomaly of Petitioners' Contention

The original charges named "International Association of Machinists and Aerospace Workers, Lodge 359"; and "Brotherhood of Boilermakers, Blacksmiths, Forgers, Helpers, Local 583".[7]

Petitioners contend that this format of nomenclature includes the Internationals as parties.

Lead counsel for Petitioners is "Goldstein, Barry L." By petitioners' contention *any* "Goldstein", particularly the sire of "Goldstein, Barry L.", is also included in that name and would be a party in any action against "Goldstein, Barry L.".

---

[7] Petition, Attachment A.

Due process is a matter of more substance than petitioners would have this Court hold. The factual determination of the District Court, upheld by the Circuit Court, was not erroneous and does not merit review by this Court.

CONCLUSION

For the reasons assigned, writ of certiorari should be denied.

Respectively submitted,

J. R. GOLDTHWAITE, JR.
Adair & Goldthwaite, P.C.
777 West Peachtree Street, N.E.
Atlanta, Georgia 30308
(404) 876-7100

Appendix

APPENDIX

Statutory Provisions

Civil Rights Act of 1964, as amended:

Section 706(e) [42 USC, §2000e-5(e) –

> (e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Section 706(f)(1) [42 USC, §2000e-5(f)(1) –

> (f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to

secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its dis-

cretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections (c) or (d) of this section or further efforts of the Commission to obtain voluntary compliance.

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
FEB 11 1982

No. 81-1069

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

JOSEPH TERRELL, JR., *et al.*,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

---

REPLY BRIEF

JOSEPH P. HUDSON
1909 30th Ave.
Gulfport, Mississippi 39501

DANIEL B. EDELMAN
YABLONSKI, BOTH & EDELMAN
Suite 800
1140 Connecticut Ave., N.W.
Washington, D.C. 20036

DEMETRIUS C. NEWTON
Suite 1722
2121 8th Ave., North
Birmingham, Alabama 35203

BARRY L. GOLDSTEIN *
Suite 940
806 15th St., N.W.
Washington, D.C. 20005
202/638-3278

JACK GREENBERG
JAMES M. NABRIT, III
O. PETER SHERWOOD
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1069

JOSEPH TERRELL, JR., *et al.*,
Petitioners,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Eleventh Circuit

---

REPLY BRIEF

The International Association of Machinists' and the Brotherhood of Boilermakers' Response to the petition for a writ of certiorari filed by Terrell, et al., demonstrates the need for the Court to grant the petition.

1. In their petition, Terrell, et al., set forth 9 conflicting and overlapping standards announced by 7 different circuits regarding how and when a defendant must be "named" in a charge filed with the Equal Employment Opportunity Commission in order to be subject to suit under Title VII of the 1964 Civil Rights Act. The respondents do not deny the conflict. Rather they suggest that the conflict should be resolved by yet another, a new

tenth, standard. The respondents suggest that the "decisions have been liberal" in allowing defendants to be subject to suit for "affirmative remedial relief" but not "for back pay purposes." Response, pp. 2-3. Neither the Eleventh Circuit in this action nor any other circuit or district court decision approved or even mentioned the respondents' "solution".

2. The respondents quote at length from the "scholarly and accurate analysis . . . set forth in *Stith* v. *Manor Baking Co.*, ..." Response, pp. 3-6. In *Stith* the district court describes two lines of cases which have held that a party may be included as a defendant in a Title VII case even if the party was *not* named in the administrative charge filed with the EEOC, *id.*, pp. 5-6. Although the petitioners repeatedly requested the Eleventh Circuit to make this analysis, the court refused to do so. Petition, pp. 28-30. The respondents implicitly agree that the Eleventh Circuit failed to apply relevant case law—whether parties may properly have been included as defendants even if they had not been named in an administrative charge.

3. As predicted by petitioners, the chaotic state of the law on this issue is spawning further conflicts. In rigorously construing an administrative charge by holding that parties named in the allegations of the charge but not as "respondents" may not be subjected to suit under Title VII, *Vines* v. *Alabama By-Products, Inc.*, 27 FEP Cases 1233 (N.D. Ala., Dec. 11, 1981), the district court established a rule in conflict with prior decisions, *Romero* v. *Union Pacific Railroad*, 615 F.2d 1303, 1311 (9th Cir. 1980); *Shehadeh* v. *Chesapeake & Potomac Telephone Co.*, 595 F.2d 711, 727-28 (D.C. Cir. 1978); *Eldridge* v. *Carpenters 46 Northern California Counties*, 440 F. Supp. 506, 525 (N.D. Cal. 1977).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in their Petition, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

JOSEPH P. HUDSON
1909 30th Ave.
Gulfport, Mississippi 39501

DANIEL B. EDELMAN
YABLONSKI, BOTH & EDELMAN
Suite 800
1140 Connecticut Ave., N.W.
Washington, D.C. 20036

DEMETRIUS C. NEWTON
Suite 1722
2121 8th Ave., North
Birmingham, Alabama 35203

BARRY L. GOLDSTEIN *
Suite 940
806 15th St., N.W.
Washington, D.C. 20005
202/638-3278

JACK GREENBERG
JAMES M. NABRIT, III
O. PETER SHERWOOD
ERIC SCHNAPPER
Suite 2030
10 Columbus Circle
New York, New York 10019

Attorneys for Petitioners

* Counsel of Record